# ADMINISTRATIVE LAW

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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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## AGENDA OF ANNUAL MEETING

*Monday, September 15*

2:00 Council Meeting Clift Hotel

*Tuesday, September 16*

Morning Session, Room B, Clift Hotel

9:30 Report of Chairman

10:00 Discussion: Pre-Trial Procedure in Administrative Proceedings

11:30 Committee reports

12:30 Luncheon Meeting, Mirror Room, Bellevue Hotel

Address: Judicial Review of Administrative Action in California —Hon. Douglas L. Edmonds, Supreme Court of California

Afternoon Session, Room B, Clift Hotel

2:00 Discussion of Pending Legislation

a. Government Contracts
b. Administrative Procedure Act Amendments
c. Trial Examiners

3:30 Committee reports

4:30 Report of Nominating Committee and Election of Officers

5:00 Adjournment

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## COMMITTEE REPORTS

[In order to reduce printing costs the names of committee members other than the chairmen are omitted.]

## ADMINISTRATIVE PRACTITIONERS ADMISSION AND ETHICS INTERIM REPORT

As in the past, the work of this Committee has centered around the Administrative Practitioners Bill, H. R. 3097 in the 82nd Congress, introduced by Congressman Walter in January, 1951. The position of the Section with respect to this bill is discussed at some length in the Report of the Annual Meeting of last September.

Since the Annual Meeting in September, 1951, there have been the following developments:

1. *D. C. Administrative Law Luncheon:* On October 18, 1951, the undersigned and Ashley Sellers addressed the Annual Luncheon of the Administrative Law Section of the D. C. Bar Association in Washington on the subject "Should Practice Before Administrative Agencies be Confined to Lawyers". Our remarks were reprinted in the January issue of the Journal of the Bar Association of the District of Columbia, a copy of which is attached hereto. The choice of subject of this luncheon meeting appeared to be a result of the discussion and interest that developed at the Annual Meeting in New York in September, and interest in the subject of administrative practitioners and practice before administrative agencies is increasing.

2. *Work with Unauthorized Practice Committee:* Close contact has been maintained with the Chairman of this Committee and Mr. John D. Randall, Chairman of the Standing Committee on the Unauthorized Practice of the Law, with respect to the following:

A. *"Tax Consultant":* Through cooperation of the Telephone Company, and based on the agreement of the Association with the American Institute of Accountants, the telephone directories throughout the United States, with one exception, have now been changed so as to eliminate the Yellow Book heading "Tax Consultant". Most of those previously listed under this heading were accountants and laymen. The one exception, the District of Columbia telephone book, still carries this listing. Arrangements, however, have now been made by Leonard Walsh, President of the D. C. Bar Association, and Richard Merrick, Chairman of that Association's Committee on the Unauthorized Practice of the Law, to eliminate this heading in the editions of the Washington telephone directory to be issued after the present one, probably beginning June, 1952.

B. *Revision of the Treasury Department Rules of Practice:* For many years the Treasury Department has maintained in Department Circular 230, an elaborate code of practice for persons wishing to do business before the Department. The Department is presently considering revision of Circular 230, and after extensive consultation with Mr. Randall, the undersigned arranged for a high level conference in the Treasury Department, for the presentation of proposals for consideration by the Department in revising the circular. Present at the meeting on January 3, 1952 at 2:00 P. M., among others, were John L. Graves, Chairman of, and Alison M. Rupert, Counsel for the Treasury's Committee on Practice. We advanced, among others, the following suggestions:

(1) *Ethics:* The Treasury Rules presently set up an independent code of ethics for both lawyers and laymen, differing in some respects from those of the Bar Association, the American Institute of Accountants, and the recent agreement with the accountants. For instance, the Treasury Code would permit accountants to advertise themselves as "Tax Consultants". Mr. Randall and I suggested that the Treasury Rules be revised so as to incorporate by reference or otherwise, the Codes of Ethics of the American Bar Association and the American Institute of Accountants, rather than to

endeavor to write a third or independent set. It was also suggested that the recent agreement between the American Institute of Accountants and the Association be incorporated by reference in or added as an Appendix to the proposed revised edition of Treasury Department Circular 230.

(2) *Notices of Appearance Instead of Powers of Attorney:* We suggested that it was inappropriate for the Treasury Department to require a lawyer to file a power of attorney in order to be permitted to represent a particular client before it. We pointed out that in litigation in the courts generally throughout the land there is a clear presumption that an attorney is authorized to represent the person he professes to represent and that that presumption can be rebutted, not by assertion, but only by affirmative, factual proof. It was further pointed out that sometimes great inconvenience is involved in obtaining a written power of attorney from an established client who may be ill, infirm, traveling, etc., and that requiring lawyers to obtain powers of attorney is also incompatible with the honor and respectability required of the profession, and serves no useful purpose. Accordingly, we suggested that, as in the Courts, a written power of attorney be dispensed with for lawyers, requiring instead a Notice of Appearance in each case, which could contain among other things, such information as is now required by the Treasury Department in its powers of attorney. We further pointed out that requiring a written Notice of Appearance by attorneys at law in each separate proceeding would have the salutary effect of preventing lawyers, who have become disbarred, suspended or censured from continuing to practice before the Department. For, to be effective, such a Notice of Appearance should require a written representation that the person is a member in good standing of the Bar of a State or Federal Court. The Treasury Department has recently discovered through a Congressional Investigation that its roll of over ninety thousand practitioners include disbarred lawyers, ex-convicts, etc. As a result, in its Release of November 16, 1951 and the addition of 31 C.F.R. 10.6, it cancelled all previous enrollment cards and required new applications for enrollment.

Appreciation is due to the Treasury Department for its excellent cooperation and friendly consideration.

3. *Ehrlich Complaint:* Mr. Philip Ehrlich of San Francisco made a complaint to the Association with respect to certain objectionable language delivered by an attorney for the Federal Trade Commission in oral argument before the full Commission, which language Mr. Ehrlich considered to have been directed against him personally. The undersigned and Mr. Herman Tocker, Chairman of the Section's Committee on Advertising, Trade and Securities Regulation, investigated this complaint and consulted with officials of the Federal Trade Commission, including the Secretary-Executive Director, the General Counsel, the Director of the Bureau of Anti-Monopoly, and the Chief of the Trial Section. It was stated to these representatives of the Commission that its proceedings are quasi-judicial in character and should meet the "cherished judicial tradition" articulated by Mr. Chief Justice Hughes in *Morgan* v.

*United States* (1938), 304 U. S. 1; and that hence the question was whether the objectionable language involved in Mr. Ehrlich's complaint was incompatible with the judicial tradition.

As a result of this conference, the Commission agreed to reconsider its action of August 23, 1951, which involves considering the striking of the objectionable language; and the Commission delivered to us a general policy statement, indicating clearly that it does not intend to tolerate objectionable, vituperative or abusive language on the part of counsel for itself or any party, during oral argument or in affidavits, briefs, etc. Indeed, the Commission has stated to us that its standards in this respect are higher than those required by Canons 15 and 17 of the Canons and Ethics of the Association.

Appreciation is due to the Federal Trade Commission for its candid and friendly recognition of the problem involved and its effective disposition of it.

4. *The Administrative Practitioners Bill:* Your Chairman has made various attempts to see Chairman Walter since Congress opened this year in regard to setting the Administrative Practitioners Bill for a hearing, but has been unable to do so. These efforts are continuing, however, and it is our hope that the Bill may be set for hearing sometime later in the Spring.

5. *The General Outlook:* The subject of practice before administrative agencies and the qualifications of the people engaged in such practice appear to be coming more and more into the limelight, and additional support appears to be accruing in favor of the Administrative Practitioners Bill. It is, however, a far-reaching undertaking and every means of additional support which can be utilized to organize public opinion in support of the bill should be utilized. The officers and members of the Section and this Committee should take advantage of such forums as may be available to bring this matter more before the public.

F. TROWBRIDGE VOM BAUR
Chairman

February 15, 1952.

## FINAL REPORT

This report supplements and brings up to date the Interim Report of our Committee dated February 15, 1952.

1. *The Administrative Practitioners Bill:*

At a conference held on February 29, 1952 with Congressman Walter, Chairman of the House Judiciary Committee; John W. Cragun; Charles R. Richey; and the Chairman, Congressman Walter stated that it was his desire to have H. R. 3097 reported out of Committee as soon as possible. With the heavy pressure of legislation this session it does not now seem practicable to expect favorable action until the next session of Congress. Sentiment, however, seems to be growing in general support of the bill and the fight for its passage should be continued.

2. *S-2293: A Code of Official Conduct for Government Employees:*

This bill was introduced by Senator Humphrey on October 17, 1951 and referred by

the Chairman of the Administrative Law Section to this Committee, along with a voluminous amount of correspondence between Wendell Berge and the Committee Chairmen of the Section, expressing views on the bill.

S-2293 is the most controversial subject within this Committee during the expiring year. The widely varying views of its members may be summarized as follows:

A. The wisdom of endeavoring to legislate Government morals by bills of this kind is very doubtful. With the right kind of men at the top of the various Government departments, there would be no need at all for a bill of this kind. Nevertheless, it does seek to reach an objective which is a worthy one.

B. The objective sought could be reached in part by raising the salaries at the top and at higher levels of Government employees. As it is now, many Government employees regard positions in the Government as mere stepping stones toward positions elsewhere. They are, therefore, more interested in deals with private concerns than with making Government service a career. Higher pay would tend to change this undesirable state of facts and to put Government employment at higher levels more on a career basis. As it is, stenographers and low-grade clerks are now paid on a basis comparable to the pay of those in private industry, but as the salary ranges increase they completely fail to keep pace with the responsibility conferred, in any sense. This system tends to weed the good men out of Government, and to concentrate their attention on extra curricular objectives. Inflation is also partly responsible.

C. The bill should not be incorporated into the Administrative Procedure Act under any circumstances. That Act is cohesively devoted to a single subject which is inherently different from a code of official conduct for persons in the Executive Branch. If the bill is to be pressed, therefore, it should not be added to the A. P. A.

D. The agency heads are as much in need of an elevation of morals as those under them. Yet the present bill, while granting vast power to the agency heads to summarily dismiss an employee, has apparently no application to the agency heads themselves.

E. There are no provisions for judicial review and in any event the penalties are too severe. The penalty should be suspension with pay pending judicial review rather than summary dismissal.

F. The bill has been very badly drafted. Section 105 goes much too far and there are numerous deficiencies of draftsmanship and grammar in the bill.

G. The bill tends to use the meat ax approach on a problem that is not new. There are numerous provisions of statutes and administrative rules already in existence which seek to cope with this problem by preventing many of the conflicts of interest which would also be prohibited by the bill. Many of the agencies have a great deal of individual history and experience which should be ascertained and investigated before proceeding with so drastic a measure. Hence it might be very worthwhile for the

bill to be referred for study by the Civil Service Commission in cooperation with the American Bar Association, in order to develop all the experience and history behind the problem. In addition, it is not at all clear so far that the need for this bill is more than a temporary one. There have been times in our Government history when it was considered an honor to work for the Government, particularly to hold a post of responsibility. It is not beyond the realm of possibility that we may again experience that approach. If the problem can be cured through administration, rather than legislation, that would be distinctly preferable. Hence, one value of the study above suggested would be that the bill could be considered more temperately over the passage of another year or so.

3. *Prohibition of Pay for Legal Services:*

There has long been a legislative fee limitation which has the effect of prohibiting lawyers from rendering legal services in connection with the obtaining of Veterans' benefits.

The method used is to prohibit lawyers from receiving compensation for such legal services, or to limit their compensation to something like $10.00. This is the subject of a recent complaint to the American Bar Association by Ezra E. Phillips, Esq. of Atlanta, Georgia, which was considered by our Committee.

He cites as a clear example of this type of provision Section 119 of the Soldiers and Sailors Dependency Allotment Bill, Public Law 625, 77th Congress, which provides categorically that no lawyer should be paid any part of Veterans' benefits conferred by the Veterans' Administration, for legal services rendered.

There are the following objections to this type of legislation:

A. By eliminating lawyers from representation of the parties involved, it tends to eliminate argument and an orderly presentation of evidence, and to give the agency a carte blanche control over the proceedings and the dispostiion of the issues. It facilitates arbitrariness and inadequate consideration and resembles the attitude toward lawyers in totalitarian countries. Where there is no lawyer to object, insist, or argue an agency can do pretty much what it wishes. This is wholly inconsistent with the basic philosophy of procedural due process and the right to counsel under our Constitutional system.

B. When it comes to prosecuting claims, the lawyer, more than anyone else, is worthy of his hire and is entitled to reasonable compensation.

There is no substitute for lawyers and the legal profession when it comes to prosecuting claims, trying cases, and arguing questions of law. It is high time that the Bar stood up and fought legislation of this kind, on principle.

F. TROWBRIDGE VOM BAUR
Chairman

July 18, 1952

## SPECIAL COMMITTEE TO RE-STUDY SENATE BILL 1770, A BILL TO AMEND THE ADMINISTRATIVE PROCEDURE ACT AND ELIMINATE CERTAIN EXEMPTIONS THEREFROM

It will be noted that the majority of the Committee, in its recommendation numbered "(2)", urges that the Section endorse and actively support "S. 1770, which, having now passed the Senate and having been favorably reported by the House Committee on the Judiciary, is presently on the Union Calendar No. 649". The Second Session of the 82d Congress, has now adjourned *sine die* without the enactment of S. 1770, and for that reason (barring a Special Session) it is not technically correct to speak of supporting S. 1770. However, the sense of the Committee's recommendation is clear, and since the Committee is widely separated geographically, the report is being transmitted in the form in which drafted prior to Congress' adjournment.

1. The two principal areas in which difficulty has arisen are rule making and adjudication. As to rule making, the exceptional cases are already adequately covered in Section 4 of the APA by the proviso that notice of proposed rule making is not required "in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Even if, as to a particular agency, most of its rules would be subject to the exception, the Committee sees no harm in requiring the agency to avail itself thereof rather than obtaining a blanket exemption from the Act. There is no great inconvenience in attaching a routine clause to rules which come within the exception. There may be some rules as to which the exception would not properly be applicable. (Why should the safeguards of the APA be sacrificed as to them, even if they are few?) The Committee finds no justification for the plea of general exemption based upon the rule making requirements of the APA. The Act provides adequate and practical means of avoiding delays in all cases in which public interest would be adversely affected by compliance.

2. As to adjudication, Section 5 does not apply, in any case, unless a statute requires determination on the record after opportunity for agency hearing, and even then many situations are exempt. The adjudicative feature of the APA is not a blanket which smothers agency action. Section 5 (b) (1) provides opportunity for informal procedures prior to the formal hearings under Sections 7 and 8. Of course, it is true that when a statute provides for decision on a record after agency hearing, the hearing must be conducted as required by the Act. But the only provisions relative to adjudication in the Act which might embarrass the effective functioning of any agency are the requirements for special examiners, and for separation of functions. As to the former, Section 7 (a) provides expressly that nothing in the Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers spe-

cially provided for or designated pursuant to statute. If an emergency agency feels that it would be a hardship for it to take evidence by the agency itself or one of its members, or by examiners appointed under the Act, it should seek authority in its own governing statute for use of different officers. This, at least, would bring to Congressional notice the category of persons entrusted with with the hearing function as to that agency.

3. There is no similar exception provided in the Act itself for avoiding the requirement of separation of functions. So far as the Committee understands, only the Immigration and Naturalization Service finds this requirement burdensome. To meet this objection the following addition is offered to the last sentence of Section 5 (c): "nor in cases in which all parties to the hearing expressly waive any of the requirements of this paragraph." If the Immigration and Naturalization Service finds it expedient to conduct deportation hearings by investigative officers, and parties subject to such hearings do not object, the Committee can see no reason why the requirements of Section 5 (c) should be insisted upon. It is not expected that any considerable number of wetbacks would demand hearings by non-investigative officers when, in all probability, their period in custody would be lengthened as a result. On the other hand, an American citizen rounded up with a group of wetbacks and charged with them as being illegally in the United States might be very anxious indeed to have the full protection which the law allows. Every person whose vital personal or property rights are subject to administrative determination following an administrative hearing ought to have the *right* (unless he expressly waives it) to be heard by an independent officer. So long as the election remains with the person whose rights are called in question, however, no harm can easily result from permitting the possibility of hearings, in special cases, conducted by investigative or prosecuting officers. It seems to the Committee that this simple amendment to Section 5 (c), as proposed, would eliminate the only objection of merit to applicability of the adjudicative features of the APA to all agencies.

4. Your Committee believes that the argument that agencies exempt from the Act are nonetheless conducting their operations in accordance with due process of law is not an answer to the objection raised to their exemption from the Act. General exemptions suggest that the Act is inflexible and sets up a procedure which can be applied only to select agencies. This line of reasoning will lead to the destruction of the Act as the effective charter of administrative practice and procedure. Even if other systems are good, we still should strive to bring all systems within the single Act, to the extent that this is feasible. Let us look in one place to find out how, generally, administrative rules will be enacted and administrative hearings will be conducted. We can look to specific statutes for specific exceptions. They will not break down the purpose and philosophy of the APA. But general exceptions, widely tolerated, surely will do so. Furthermore, emergency agencies may, under existing world tensions, last indefinitely into the future.

5. The Committee believes that emergency and other agencies which have sought and obtained general exemptions from the APA have failed to analyze the Act for the purpose of ascertaining specific respects in which their operations might seriously be impeded by compliance with the Act. We think they should be made to do so. This can be accomplished by removing general exemptions and forcing the agencies to seek particular exceptions where authorized under the Act. To this end your Committee recommends as follows:

(1) That Section 5 (c) of the Administrative Procedure Act be amended by adding the following clause to the last sentence thereof: "nor in cases in which all parties to the hearing expressly waive any of the requirements of this paragraph."

(2) That the section of Administrative Law endorse and actively support S. 1770, which, having now passed the Senate and having been favorably reported by the House Committee on the Judiciary, is presently on the Union Calendar No. 649."

WHITNEY R. HARRIS
ROBERT H. YOUNG
HARRY J. BREITHAUPT, Chairman

*Separate Concurrence of Louis L. Jaffe*

I am in complete agreement with the general principles expressed in the report of the special committee. As indicated in the report the very generous escape and exemption provisions in the APA for business requiring dispatch, secrecy, or informality will enable even quite extraordinary agencies to function under it. It is of first importance as the report points out that the APA be accepted as far as possible as a statement of general principles governing administrative organization and procedure. It was to this end that the act itself contained the already mentioned exemption and escape clauses. From this it follows, as the report points out, that an agency should not summarily seek total exemption from the act. It should be put to the pains of studying very closely its situation in order to arrive at a well grounded conclusion as to whether or not it can live within the quite generous terms of the APA.

My only question concerning the report arises with respect to the specific character of the second recommendation whereby we endorse S. 1770 as it stands. Though, as I have already indicated, I agree with the general principles stated in our report, it seems to me that there may be some agencies which do require total exemption and to force such agencies within the mold of the APA would strain both them and the APA itself and thus undermine the APA. Whether any of the agencies whose exemption is to be repealed by S. 1770 is within that category I do not know. As chairman of the subcommittee on immigration I have studied in considerable detail the exemption of the Immigration Service and have concluded with that committee that the exemption is not justified. But I have not had an opportunity to study the other agencies and I therefore hesitate to say that none of them requires total exemption. With this qualification I concur with the committee's report.

Louis L. Jaffe

*Concurrence of Harry J. Breithaupt, Jr.*

Because I am on record as opposing the repeal of the provisions of the Defense Production Act of 1950, as amended, which excludes the functions exercised under that Act from the operation of the Administrative Procedure Act (see my report, for a unanimous committee, as Chairman of the Committee on Emergency Agencies, dated February 15, 1952), I feel that there is due a word of explanation for my concurrence in the majority report of this *ad hoc* committee. Suffice it to say that more mature consideration and the interchange of views of the members of this committee have dissuaded me from my earlier position.

HARRY J. BREITHAUPT, JR.
Chairman

## ADVERTISING, TRADE AND SECURITIES REGULATION

The Committee was organized in the early Fall of 1951. The work of the Committee during the past season consisted principally of (a) consideration of the effects of *U. S.* v. *Wunderlich,* 342 U. S. 98, and the proposed legislation to rectify the results; (b) the imposition by the Securities and Exchange Commission of certain fees and charges, and (c) several complaints involving actions of administrative officers in the Federal Trade Commission and Securities and Exchange Commission.

A. With respect to the effect of the Wunderlich decision and the proposed remedial legislation, the Committee was unanimous in urging the support by the Association of the widest possible remedial legislation. Numerous comments were received on the various proposed Bills and some suggestions were made for altering some of the wording in these Bills. It was felt, however, that no direct proposals by this Committee for specific Association action would be necessary in view of the widespread interest in and support of the remedial legislation by numerous other Sections of the Association and by many local bar associations.

B. The general sentiment of the Committee with respect to the proposed fees and charges by the Securities and Exchange Commission was that this was a matter not properly within the scope of this Committee's work and that if any American Bar Association action were sought, the problem should first be submitted to the Corporation, Banking and Business Law Section for its consideration and recommendation.

C. The complaint by Philip S. Ehrlich, Esq., attorney for Crown-Zellerbach Corporation, against a Federal Trade Commission trial examiner and a Federal Trade Commission attorney was taken up with the General Counsel and other Division heads of the Federal Trade Commission. The result was quite satisfactory in that we obtained from the Federal Trade Commission a statement of policy governing the conduct of attorneys, both for respondents and the Commission, before the Commission, also a disapproval by the Commission of the language used and the Commission subsequently entered an order in the

Crown-Zellerbach case striking from the record certain objectionable language.

The complaint of Arthur A. Armstrong, Esq., of Los Angeles, California, concerning the conduct of two members of the staff of the Securities and Exchange Commission was taken up with the Commission. The Commission made an exhaustive investigation of the facts and circumstances and furnished the undersigned with a copy of its findings. The facts would indicate that Mr. Armstrong, while understandably aggrieved, did not have a complaint which justified disciplinary action by the Commission.

The work of the Chairman and of the Committee generally was the subject of reports to each Committee member during the season.

HERMAN TOCKER
Chairman

## AGRICULTURE, FOOD AND DRUGS

The activities of the Committee during the past year have been two-fold in nature. First, all court decisions, administrative rulings and legislative proposals affecting the application of the Administrative Procedure Act to the regulatory functions exercised by the United States Department of Agriculture and the Food and Drug Administration of the Federal Security Agency were reviewed and evaluated. Second, consideration was given to the type of long-range program which should be undertaken by the Committee to further the effectuation of the letter and spirit of the Administrative Procedure Act in its relationship to the administrative procedures of these two important federal regulatory agencies. The first of these activities was simplified by the paucity of significant developments in the field. The result of the second of these activities is the subject of the recommendations which are made in this Report.

1. *The Administrative Process in the Department of Agriculture*

The Department of Agriculture is one of the largest and most diversified regulatory agencies in the Federal Government. As such, it administers the greatest number of regulatory acts of any federal agency, many of which vary widely in subject matter and in the procedural manner in which they are administered and enforced.

The four primary regulatory statutes under which the administrative process operates are the Packers and Stockyards Act of 1921, the Commodity Exchange Act, the Agricultural Marketing Agreement Act of 1947 and the Perishable Agricultural Commodities Act. As the Appendix to this Report indicates, the Department regulates the conduct of various marketing facilities such as agricultural commodity exchanges, warehouses storing agricultural commodities, stockyards and meat packing plants. It is responsible for establishing grades and standards for a wide group of farm commodities and products such as fruits and vegetables, grain, cotton, tobacco, wool, naval stores and containers. It is responsible for the prevention and eradication of plant and animal insects and diseases which threaten the food supply. This requires extensive administrative implementation of legislation. A large measure of regulatory

control is exercised over the labeling and composition of farm products such as seeds and economic poisons designed for pest control. All of these regulatory activities are in addition to the executive functions of the Department under the broad research and economic programs for which it is responsible.

With such a labyrinthian structure of regulatory responsibility, it is inevitable that the procedures and procedural practices of the Department should have an important impact on a large number of people. Farmers, businessmen, housewives and lawyers alike are vitally concerned with the manner in which this administrative process is executed.

The enactment of the Administrative Procedure Act in 1946 had its effect upon the administrative functions of the Department of Agriculture as well as upon those of other agencies and departments. The full measure of this unfortunately has not been appraised in recent years. This should be done. However, it can be said that some important changes have been made as a result of the Act and its basic tenet of fair play.

In only one instance has the full application of the Administrative Procedure Act to a function of the Department been spefically denied by the Congress. This was in the enactment of the International Wheat Agreement Act of 1949. Even here, however, the requirements of the Act relating to publication in Section 3 and judicial review in Section 10 were not excluded.

The administrative activities of the Department are both rule-making and adjudicatory within the sense of the Administrative Procedures Act. Rule-making is the most important in nature and scope. For example, this form of administrative activity is exercised in the issuance of marketing orders under the Agricultural Marketing Agreement Act of 1937 and rate orders under the Packers and Stockyards Act of 1921. Adjudicative functions are exercised primarily in reparation proceedings under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act and under various licensing statutes. Many of the rule-making and adjudication proceedings are subject to the formal procedural safeguards of Sections 7 and 8 of the Administrative Procedure Act due to a statutory requirement of a hearing. A few adjudicative functions are not limited by these sections, such as reparation proceedings under the Packers and Stockyards Act where the administrative determination is reviewable by a court of law in a trial de novo.

Two signal effects of the Administrative Procedure Act may be noted. First, rule-making hearings have been protracted in length and in the volume of the record compiled due to the wider participation by interested parties. Advocates of this contemplated result of the Act believe that the importance of the issues involved in these proceedings requires a full hearing with the uninhibited right of cross-examination. On the other hand, there are those who believe that needless inefficiency has been created by long and costly hearings. Second, the necessity of accompanying rules and orders emanating from these proceedings with stated findings and conclusions has

resulted in more thorough and considered determinations and dispositions. This has been generally acclaimed as a satisfactory creation of the Administrative Procedure Act.

It is generally conceded that many of the valuable procedural rights in administrative proceedings secured by the Administrative Procedure Act are rendered nugatory unless there is the safeguard of judicial review. The large majority of the regulatory functions of the Department are subject to court review. In some statutes, a detailed method of review is spelled out. In only one statute is review expressly denied. There are some functions of a discretionary nature the review of which would seem to be precluded by Section 10 of the Act.

2. *Developments During the Past Year*

During the past year, there were no significant judicial decisions, administrative rulings, or legislative proposals which directly affected administrative procedures or judicial review under the regulatory statutes of the Department of Agriculture. The Administrative Procedure Act was applied to a function of the Department in one reported decision by the United States District Court for the District of Columbia, *Cargill* v. *Commodity Exchange Commission,* 103 F. Supp. 992 (April 8, 1952). In this case, the court held that the legality of a decision by the Commodity Exchange Commission under the Commodity Exchange Act was reviewable and subject to the declaratory judgment remedy provided for by Section 10 of the Administrative Procedure Act.

3. *The Administrative Process in the Food and Drug Administration*

The primary regulatory statute administered and enforced by the Food and Drug Administration is the Federal Food, Drug and Cosmetic Act of 1938. The four other regulatory statutes administered are listed in the Appendix to this Report. This law regulates the sale and distribution of foods, beverages, drugs, therapeutic devices and cosmetics; controls the labeling and composition of these products; authorizes the establishment of definitions and standards of identity, quality and container-fill for foods; authorizes the establishment of tolerances for added poisonous ingredients to food; provides for the control of new drugs by a licensing procedure and for the certification of anti-biotics.

The most important regulatory power vested in the Food and Drug Administration under this law is that of food standardization. Under this authority, the Administrator has the power to dictate the composition of foods and to exclude wholesome and safe ingredients if this promotes the integrity of food products. Since the passage of the Federal Food, Drug and Cosmetic Act, numerous hearings have been held on food standards, many involving thousands of pages of record and years of deliberation. The impact of these has been nation-wide.

The unprecedented control over the economics of the food, drug and cosmetic industries which this Act originated has been tempered to a large degree by the procedural safeguards which are provided for in the Act itself. The Administrative Pro-

cedure Act adds little to these. For the most part, rule-making proceedings are attended with adequate notice, formal hearings where a large degree of participation by interested parties is encouraged, detailed findings of fact, and findings and decisions based on substantial evidence of record. Few statutes prescribe a more elaborate and detailed method of judicial review.

In recent years, the length and expense of certain rule-making proceedings, such as food standardization and the establishment of tolerances for pesticides, has provoked criticism of the complex pattern set forth in the Act. Numerous suggestions have been made to simplify these proceedings in a manner which would not do violence to the fair play concept. These have generally centered on the utility of informal conferences to develop a crystallization of crucial issues which should be concentrated on at the formal hearing.

4. *Developments During the Past Year*

During the past year, there were numerous court decisions interpreting the application of the Federal Food, Drug and Cosmetic Act and regulations thereunder. Hearings were held in food standardization proceedings and a final order was issued establishing a standard for bread and related products. Numerous new regulations and amendments to existing regulations were made. Proposals were introduced in the Congress enlarging the regulatory authority of the Food and Drug Administration, and Congressional hearings investigating the use of chemicals in foods and cosmetics were concluded. These developments were substantive in nature and therefore outside of the jurisdiction of this Committee.

There is one significant court decision bearing on the administrative practices under the Federal Food, Drug and Cosmetic Act which deserves mention in this Report although it was decided in early 1951. This is the decision by the United States Court of Appeals for the Third Circuit in *Cream Wipt Food Products Co.* v. *Federal Security Administrator,* 187 F. (2d) 789 (1951). In this case, the court set aside an order by the Federal Security Administrator establishing a standard of identity for salad dressing on the ground that it was not based on substantial evidence of record as required by Section 7 (c) of the Administrative Procedure Act and the Supreme Court's decision in the Universal Camera case. The only evidence in support of the order was an opinion by an employee of the agency. No factual basis was offered for the opinion.

The vitality of the administrative safeguards of a full and fair hearing and of court review necessarily depends upon the manner in which the results of the hearing are to be weighed and appraised. Section 701 of the Federal Food, Drug and Cosmetic Act provides that regulations for which a hearing is required must be based upon "substantial evidence of record at the hearing." It has been the customary practice of the Food and Drug Administration to utilize the opinion evidence of its own experts as a basis for decision. The Cream Wipt Food Products case sanctions this practice but requires that the opinion evidence be supported by factual evidence.

5. *Recommendations for the Coming Year*

The Committee submits the following recommendations on the type of program which should be followed during the coming year in furtherance of the objective of this Committee to promote the effectuation of the letter and spirit of the Administrative Procedure Act in its application to the procedures and practices of the agencies within its jurisdiction:

(1) The functions of the United States Public Health Service should be included within the scope of responsibility of this Committee. This agency is a part of the Federal Security Agency and is charged with the administration of laws which are similar in nature and application to those administered by the Food and Drug Administration and Department of Agriculture. It is felt that this would be a logical extension of the jurisdiction of this Committee.

(2) A study should be made of all of the functions of the Department of Agriculture, Food and Drug Administration and the Public Health Service under the regulatory laws administered by these agencies and the manner in which they are or should be affected by the Administrative Procedure Act. A preliminary study has been initiated by the Committee. It is felt that a complete study of this nature is long overdue.

(3) A continuing appraisal should be made of the manner in which the Administrative Procedure Act and the policy of this Act is being applied by the Department of Agriculture, the Food and Drug Administration and the Public Health Service. This practical assessment of administrative procedures should point the way to prompt corrective action wherever inadequacies in the administrative process are found. Close liaison should be maintained with the Committee on Improvements in Administrative Procedures.

(4) A continuing appraisal should be made of court decisions and administrative rulings relating to the application of the Administrative Procedure Act to the regulatory functions of these agencies.

(5) A continuing appraisal should be made of all legislative proposals which might have a bearing on the application of the Administrative Procedure Act to the regulatory functions of these agencies.

JOHN D. CONNER
Chairman

*Appendix*

I. REGULATORY STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

The following is a list of the principal regulatory statutes which are currently administered by the United States Department of Agriculture:

1. *Packers and Stockyards Act of 1921* (7 U.S.C.A. 181)

Regulates the rates and practices of packers, stockyard owners, market agencies, dealers and live poultry dealers and handlers in connection with the conduct of stockyard services and the handling of poultry. Administrative action under the

law includes the establishment of rates to be charged by stockyards and market agencies offering services thereon, the licensing of live poultry dealers and handlers, the issuance of cease and desist orders against unreasonable rates and against unfair and discriminatory practices by packers, and the adjudication of reparation proceedings.

2. *Commodity Exchange Act* (7 U.S.C.A. 1)

Regulates the conduct of commodity exchanges in connection with futures trading in specified commodities. Certain phases of the law are administered by the Commodity Exchange Commission, composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. Administrative action includes the registration of future commission merchants and floor brokers, the designation of Boards of Trade as contract markets, the supervision of certain prohibited market practices, the establishment of limits on speculative trading, the suspension of registrations and denial of trading privileges, the revocation of contract market designations, and the issuance of cease and desist orders against officers of contract markets violating the Act.

3. *Perishable Agricultural Commodities Act* (7 U.S.C.A. 499)

Regulates the handling and marketing of fresh fruits and vegetables by commission merchants, dealers and brokers. Administrative action includes the licensing of commission merchants, dealers and brokers, supervision over unfair and fraudulent practices, and the adjudication of reparation proceedings.

4. *Agricultural Marketing Agreement Act of 1937* (7 U.S.C.A. 601)

Regulates the handling of milk, fresh fruits and vegetables and other specified agricultural commodities by processors, associations of producers, and others engaged in such handling for the purpose of maintaining the purchasing power of producers. Administrative action involves primarily the issuance of marketing orders providing for the classification and minimum class price of milk and restrictions as to the volume, grade and size of other commodities.

5. *Sugar Act of 1948* (7 U.S.C.A. 1100)

Regulates the distribution of sugar by providing for sugar marketing quotas and a payment program for domestic producers of sugar cane and sugar beets who comply with certain specified conditions. Administrative action includes hearings on proposed sugar allotments and hearings in connection with the payment program.

6. *Agricultural Adjustment Act of 1938* (7 U.S.C.A. 1281)

Regulates the production of basic agricultural commodities by providing for marketing quotas, parity payments to producers, and loans.

7. *United States Warehouse Act* (7 U.S.C.A. 241)

Regulates the storage of agricultural commodities by warehousemen under a permissive licensing procedure.

8. *Meat Inspection Act* (21 U.S.C.A. 171)

Provides for the inspection and approval of meat packing establishments in which

cattle, sheep, swine or goats are slaughtered and in which the carcasses or meat food products thereof are prepared.

9. *Tobacco Inspection Act* (7 U.S.C.A. 511)

Authorizes the establishment of standards of quality and condition of tobacco and the designation of tobacco auction markets.

10. *Tobacco Seed and Plants Exportation Act* (7 U.S.C.A. 516)

Prohibits the exportation of tobacco seeds or live tobacco plants to any foreign country except under a permit issued by the Secretary of Agriculture.

11. *Anti-Hog-Cholera Serum and Hog-Cholera Virus Act* (7 U.S.C.A. 851)

Regulates for economic purposes the marketing of anti-hog-cholera serum and hog-cholera virus.

12. *Virus-Serum-Toxin Act* (2 U.S.C.A. 151)

Regulates by licensing the preparation, sale and distribution of virus, serum, toxin, and related products, intended for use in the treatment of domestic animals, for the purpose of preventing the marketing of worthless or harmful animal remedies.

13. *Plant Quarantine Act* (7 U.S.C.A. 151)

Regulates the importation of nursery stock which may introduce injurious plant diseases or insect pests and authorizes domestic quarantines to prevent the spread of dangerous plant diseases or insect infestations.

14. *Insect Pests Act* (7 U.S.C.A. 141)

Prohibits the importation and transportation of certain injurious insect pests.

15. *Act of August 31, 1922* (7 U.S.C.A. 281)

Prohibits the importation of honey bees with certain exceptions.

16. *Federal Insecticide, Fungicide and Rodenticide Act of 1947* (7 U.S.C.A. 121)

Regulates the sale and distribution of insecticides, fungicides, rodenticides and other pesticides; provides for registration of these products and controls their labeling and composition.

17. *Federal Seed Act* (7 U.S.C.A. 1551)

Regulates the sale and distribution of agricultural, vegetable and weed seeds; controls their labeling, advertising and mixture.

18. *Naval Stores Act* (7 U.S.C.A. 91)

Establishes standards for resin and turpentine and authorizes the establishment of additional standards for naval stores.

19. *United States Grain Standards Act* (7 U.S.C.A. 71)

Authorizes the establishment of standards of quality and condition for corn, wheat, rye, oats, barley, flaxseed and other grains.

20. *United States Cotton Standards Act* (7 U.S.C.A. 51)

Authorizes the establishment of standards of quality for cotton.

21. *Wool Standards Act* (7 U.S.C.A. 251)

Authorizes the establishment of standards for grades of wool.

22. *Standard Container Act* (15 U.S.C.A. 251)

Authorizes the establishment of standards for containers for fruits and vegetables.

23. *Act of June 24, 1936, as amended* (7 U.S.C.A. 951)

Authorizes the establishment of grades and standards for peanuts.

II. Regulatory Statutes Administered by the Food and Drug Administration

The following is a list of the regulatory statutes currently administered by the Food and Drug Administration of the Federal Security Agency:

1. *Food, Drug and Cosmetic Act of 1938* (21 U.S.C.A. 301)

Regulates the sale and distribution of foods, beverages, drugs, therapeutic devices and cosmetics; controls the labeling and composition of these products; authorizes the establishment of definitions and standards of identity, quality and container-fill for foods and the establishment of tolerances for added poisonous ingredients to food; provides for the control of new drugs by a licensing procedure and for the certification of antibiotics.

2. *Caustic Poison Act* (15 U.S.C.A. 11)

Regulates the sale and distribution of certain dangerous caustic or corrosive acids, alkalies and other poisons suitable for household use.

3. *Tea Importation Act* (21 U.S.C.A. 41)

Regulates the quality and purity of tea imported into this country.

4. *Filled Milk Act* (21 U.S.C.A. 61)

Prohibits the shipment of "filled milk" in interstate or foreign commerce.

5. *Import Milk Act* (21 U.S.C.A. 141)

Regulates the importation of milk and cream into the United States by a licensing procedure.

## COMMUNICATIONS

### *LEGISLATION*

Revisions of the Communications Act of 1934 which have been under consideration in various bills for more than five years became effective July 16, 1952 with the signing of the McFarland Bill (Public Law 554, 82d Cong., S. 658). Most of the proposed changes in existing law fall into the following broad categories:

1. Amendments designed to improve the organization and functioning of the Federal Communications Commission so as to "expedite the prompt and orderly conduct" of its business. Among other things, the Commission is required to act on a non-hearing application within three months of filing, on a hearing application within six months after the hearing is concluded, and report to Congress all applications not so acted upon and the reasons therefor; each Commissioner is provided with a legal and engineering assistant; and the Commission must organize its staff into integrated bureaus. A Commissioner may not engage in any

other business while serving on the Commission, and if he resigns from the Commission, he may not practice before the Commission for a year.

2. Amendments designed to clarify and improve the procedure and law relating to the granting of construction permits and licenses for radio (including television) stations, the granting of renewals of such licenses, and the transfer or modification of such permits and licenses. If an application cannot be granted without a hearing, the Commission must notify the applicant and other parties in interest of the reasons. If, after considering the reply, the Commission still finds a hearing to be necessary, the application may then be set for hearing. Any party in interest, within 30 days of a grant without hearing, may protest the grant made without hearing. If the application is set for hearing, the burden of proof is on the protesting party with respect to issues raised by the protestant which are not specifically adopted by the Commission.

3. Amendments giving the Commission power to issue cease and desist orders as well as to revoke licenses to secure compliance by holders of construction permits or station licenses with the duties and requirements to which they are subject under the law. The Act places the burden of proof on the Commission with respect to cease and desist hearings and revocation proceedings. That portion of Communications Act which permitted the Commission to revoke licenses of those found guilty in Federal Court of Anti-trust violations (double jeopardy clause) is deleted.

4. Amendments to clarify, and to modify in some respects, the provisions relating to (a) rehearings on orders and decisions by the Commission and (b) judicial review of Commission orders and decisions.

5. Amendments which impose special requirements applicable to proceedings involving the exercise of quasi-judicial or adjudicatory functions, designed to insure that in such proceedings the officers performing the decision-making function shall render their decisions solely on the basis of the record made in public hearing. A review staff is authorized to assist the Commission in cases of adjudication by (1) preparing summaries of evidence presented at hearings, (2) preparing compilations of material facts regarding exceptions and replies following initial decisions and (3) preparing, without recommendations and in accordance with specific directions, memoranda, opinions, decisions and orders. No employee of the Commission (except the Commissioners' personal assistants) may perform the duties and functions assigned to the review staff except members of that staff.

On September 30, 1948, the Federal Communications Commission issued a Report and Order, commonly referred to as the "freeze order" which provided that no new or pending applications for the construction of new television stations would be acted upon by the Commission, pending adoption of television assignment plan and new Rules, Regulations and Standards relating to construction and operation of television stations.

Since that time, various rule making hearings have been conducted to determine the

frequencies which would be allocated for use by television broadcasting stations; engineering standards and rules and regulations to be applied to the allocation, construction and operation of television broadcasting stations, and the allocation of specific television channels to cities throughout the United States.

Following extended rule making procedures, the Federal Communications Commission on April 14, 1952, issued its Sixth Report and Order in which it made final its Standards of Engineering Practice and Rules and Regulations regarding the allocation, construction, and operation of television stations, and also, allocated television channels to cities throughout the United States.

Prior to the "freeze order" in 1948, only VHF Channels 2 through 13, (54-216 megacycles) were available for television broadcasting stations (Channel 1 was deleted for television use in 1948). In the Commission's Sixth Report and Order, it also made Television Channels 14-83 (470-890 megacycles) available for use by television broadcasting stations.

Generally speaking, the Federal Communications Commission allocated from six to ten television channels to cities with a population of one million and above; from four to six television channels to cities with populations of 250,000 to one million; two to four television channels to cities with populations of from 50,000 to 250,000 and one or two television channels to cities with populations of less than 50,000. In addition, the Commission reserved television channels for non-commercial educational use in many of the larger cities of the country and also in educational centers.

The Federal Communications Commission commenced to process the new and amended application authorized to be filed by the Sixth Report and Order on July 1, 1952, as of which date there were 108 television stations on the air in the United States and approximately 500 applications for new television stations pending before the Commission.

## *LITIGATION*

### I. Decisions on Appeals

1. *American Broadcasting Company, Inc. (WJZ)* v. *F. C. C.*, 191 F 2d 492, 7 Pike & Fischer RR 2033 (App. D.C., July 19, 1951)

The Court reversed the orders of the Commission extending SSA authority for KOB to operate on the frequency assigned to Class I-A Station WJZ and remanded the cases "for action not inconsistent with this opinion." The Court held that in view of the fact the "temporary measure" had lasted since 1941, the proceedings on the contested extensions of the SSA did not satisfy the requirements of Section 312(b) of the Act (relating to modification of license after notice and hearing) and brought the proceedings within the requirements of the *KOA* deicsion (319 U.S. 239). The opinion concluded by stating that the Commission should consider anew the problem of a permanent assignment for KOB and that "if appropriate proceedings are promptly begun and expeditiously carried

forward, we would not regard it as inconsistent with our holding here if the Commission were to preserve the status quo for such reasonable period as may be necessary to make 'a valid determination * * * with all deliberate speed.' * * *"

2. *Independent Broadcasting Company* v. *F.C.C.*, 193 F 2d 900, 7 Pike & Fischer RR 2066 (App. D.C. October 25, 1951)

The Court affirmed the Commission's denial of two broadcast applications, holding: (1) "The record fully * * * supports the findings. The evidence left no doubt as to misrepresentation and concealment of pertinent factual information. It contained information showing not only that Smith (a majority stockholder of the applicant) had been intemperate in his writings, sermons and broadcasts, but that he was an expert in vituperation and vilification," (2) Section 312(a) of the Act (relating to revocation of licenses) applies only to licenses and not to construction permits and (3) The Commission was not required, after concluding that Smith's character made him unfit to be a licensee, to consider the character of the other two stockholders "before concluding that the corporation could not be trusted with a license." A *Petition for Certiorari* is pending before the U. S. Supreme Court.

3. *Democrat Printing Company (KS EO)* v. *F. C. C.*, F 2d , 7 Pike & Fischer RR 2138 (App. D. C. June 12, 1952)

The Court remanded the case to the Commission for further proceedings "in accordance with this opinion." The Court held that since Section 312(b) of the Act and FCC Rule 3.24 (which spells out the basis on which broadcast applications for new or increased facilities will be granted) were applicable, the Commission could "reach a legally valid conclusion on the ultimate question of the public interest" only by balancing "the public benefit from the operation of the new station" against "the public loss it might occasion" because of interference to other stations. The Court found error in that "the record establishes only one side of the equation."

The Court also held: (1) Rule 3.24 "appears to place" on the applicant the burden of proof of establishing that the need for the proposed service outweighs the need for the service which will be lost, (2) the record contained no substantial evidence for the conclusion that "the grant * * * will not impair the (financial) ability of KSEO (an adjacent channel station) to continue to serve * * * (its) area," (3) neither the Commission nor appellant can rely on arguments or reasons not advanced below, (4) where no showing is made that it is impossible or impractical to locate a station in accordance with the normal blanket area requirements, it is error to grant an application violating not only the normal blanket area requirements but also the exceptions to the normal rule and (5) a failure to make a timely objection to a Commission interpretation that Section 5(c) of the Administrative Procedure Act (separation of functions) did not apply constitutes a waiver of the right to appeal the interpretation.

4. *Beaumont Broadcasting Corporation (KFDM)* v. *F. C. C.*, F 2d , 7 Pike & Fischer RR 2149 (App. D.C. June 26, 1952)

The Court remanded the grant of increased power to KWTO to the Commission for "further proceedings in accordance with this opinion." The Court found error in: (1) the examiner's cutting short cross-examination of KWTO's engineering witness on the question of whether a directional antenna could be designed for KWTO which would afford protection to all co-channel stations (including KFDM) without KWTO's suffering any loss of service, the witness having affirmatively stated it was not possible, and (2) the Commission's failure to make findings as to whether the hearing record disclosed a greater amount of interference to KFDM than assumed when a conditional grant was made to KFDM for if so, KFDM was entitled to a comparative hearing on the "issue of whether the excess was in the public interest."

The Court rejected: (1) KFDM's argument it was illegally denied a comparative hearing on the ground KFDM waived its right by accepting a conditional grant, (2) KFDM's argument that the conditional grant violated the Act and the Fifth Amendment, stating the procedure was " 'a satisfactory practical solution of a difficult administrative problem' " and (3) KFDM's argument that a violation of the "ten percent rule" (54%) required a denial on the ground the rule specifies " a norm and not a hard and fast rule * * * the governing criterion is the public interest."

No decisions were rendered by the United States Supreme Court with respect to lower court decisions on appeals taken from actions of the Federal Communications Commission. Under date of October 8, 1951, the Supreme Court denied a writ of *certiorari* respecting *Scripps-Howard, Inc.* v. *F. C. C.*, 189 F 2d 677, 7 Pike & Fischer RR 2001 (App. D.C. May 10, 1951). It will be recalled that the appellate court affirmed the Commission's decision preferring one of two mutually exclusive applications on the grounds of local ownership and diversification of the ownership of the mass media of communications.

## II. Other Decisions

The following decisions, although not related to appeals from actions taken by the Federal Communications Commission, are of interest:

1. *Application of E. F. Bennett,* 7 Pike & Fischer RR 2054 (Public Service Comm. of Wisconsin, July 3, 1951)

The State Commission dismissed an application for authority to construct a community television antenna on the grounds it was without jurisdiction in view of the "complete supervision exercised by Congress over transmission by television * * *." This ruling is contrary to a ruling of the Attorney General of Utah which holds the Utah Commission has jurisdiction over community television antennas.

2. *United States* v. *Yonkers Cabinet Corporation,* Unreported (S.D. N.Y., No. 64-281, July 10, 1951)

The Court issued a permanent injunction restraining the operation in New York of

industrial heater equipment which caused interference in Washington, D. C. to Coast Guard air-to-ground communications.

3. *Asbury Park Press, Inc.* v. *City of Asbury Park,* 7 Pike & Fischer RR 2062 (N.J. Super. Ct., September 24, 1951)

The licensee of a radio station in Asbury Park, New Jersey, a taxpayer and a citizen, joined in bringing an action to compel the city counsel to permit broadcasting of a public hearing to be held on a proposed local sales tax. The court, in an oral opinion, granted the relief requested and held that radio was included within the state and federal constitutional guarantees of a free press and that radio could not be arbitrarily excluded from coverage of a public hearing.

4. *Yates* v. *Associated Broadcasters, Inc.,* Unreported, 7 Pike & Fischer RR 2088 (U.S. Dist. Ct. N.D. Calif. November 2, 1951)

Yates, an admitted Communist, was a candidate for supervisor of the City and County of San Francisco. A request for time to air a dramatization in behalf of her candidacy made by a spokesman in her behalf was rejected on the ground it would not be in the public interest. Other candidates for the same office and spokesmen on their behalf had used the station.

Following the filing of a complaint and oral hearing the same day, the Court orally announced it would issue an order directing the station to make time available to air the dramatization. The Court based the order on a ruling that Section 315 of the Act applies to candidates and their spokesmen (in spite of the contrary decision in *Felix* v. *Westinghouse Radio Stations, Inc.,* 186 F 2d 1, 6 Pike & Fischer RR 2088 (CA 3d Circuit, December 20, 1950)). The Court also ruled the station could not censor for defamatory material and would not be liable for any defamation broadcast by one speaking on behalf of a candidate. The Court expressly ruled that the station's policy against accepting any political dramatizations was not contrary to Section 315 and that his order should not be considered a precedent on that question.

5. *Lorain Journal Company* v. *United States,* 342 U.S. 143, 7 Pike & Fischer RR 2078 (December 11, 1951)

Defendant in this case, publisher of a local newspaper, was charged with violation of the anti-trust laws because, among other things, it refused to accept advertising from persons who also advertised on the local radio station. The alleged purpose and intent of this procedure was to destroy the broadcasting station. The district court, finding the allegations to be true, enjoined the defendant from this course of conduct, and the Supreme Court affirmed. The Court held that (1) an attempt to monopolize interstate commerce in violation of the Sherman Act was involved and (2) the injunction did not violate the First Amendment.

6. *Smith* v. *Ervin,* 7 Pike & Fischer RR 2112 (Circuit Ct. of Florida, 13th Circuit, March 12, 1952)

Section 99.111 of the Florida Code requires *inter alia* that any contribution of any thing of value in furtherance of a political campaign must have the prior authorization of the candidate or his duly appointed

agent. The licensee of a Florida radio station sought a declaratory ruling as to the requirements and Constitutionality of the Statute. The Court ruled (1) a radio station may not accept payment for time to be used to promote the candidacy of a person seeking a Florida political office unless the expenditure has been authorized as required by the statute, (2) the value of any sustaining time used for the above purpose is a campaign contribution by the licensee of the station and (3) the above requirements of the statute do not render it unconstitutional as a violation of free speech as (a) the rights of freedom of speech and press as applied to radio "are necessarily, and from the beginning, more restricted than they are in relation to newspapers" and therefore the issue of free speech is not involved and (b) even if the issue of free speech is involved, the above requirements are justified as a proper exercise of police power to curb the ever-growing evil of ever-increasing expenditures in elections.

7. *Public Utilities Commission* v. *Pollak*, U.S. , 7 Pike & Fischer RR 2119 (U.S.S.C., May 26, 1952)

The District of Columbia Public Utilities Commission, after a hearing, decided "that the installation and use of radios in streetcars and buses * * * is not inconsistent with public convenience, comfort and safety." An appeal taken to the District of Columbia District Court was dismissed. The Court of Appeals held that the broadcasts deprived "objecting passengers of liberty without due process of law" in violation of the Fifth Amendment.

The Supreme Court reversed the Court of Appeals and remanded the case to the District Court. The Court held there was no violation of the First or Fifth Amendments.

Justice Black, in a separate opinion, concurred there was no violation of the Fifth Amendment and that the musical programs did not violate the First Amendment. He further stated, "I am of the opinion, however, that subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views or propaganda of any kind and by any means would violate the First Amendment."

Justice Douglas dissented on the ground that the streetcar audience is "a captive audience" and forced listening constitutes a violation of "liberty" as used in the Fifth Amendment.

Justice Frankfurter did not participate in the consideration or decision of the case on the ground "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it."

## III. Pending Appeals

As of June 30, 1952, the following appeals from actions taken by the Commission were pending before the District Court. Each appeal raises the issue of the validity of the Commission's Order adopted August 18, 1949 respecting Lotteries and give-away programs (Rules 3.192, 3.292 and 3.656).

1. *American Broadcasting Company, Inc.* v. *F. C. C.* Filed August 31, 1949 in New York (No. 52-24)
2. *National Broadcasting Company, Inc.* v. *F. C. C.* Filed September 2, 1949 in New York (No. 52-37)

3. *Columbia Broadcasting System, Inc.* v. *F. C. C.* Filed September 2, 1949 in New York (No. 52-38)

4. *Radio Features, Inc.* v. *F. C. C.* Filed September 2, 1949 in Illinios (No. 49 C 1360).

As of June 30, 1952, the following appeals from actions taken by the Commission were pending before the Courts of Appeals:

1. *RCA Communications, Inc.* v. *F. C. C.* Filed March 15, 1951 in the District of Columbia Circuit (No. 10951).

2. *WWSW, Inc.* v. *F. C. C.* Filed June 11, 1952 in the Third Circuit (No. 10785)

3. *Evangeline Broadcasting Company* v. *F. C. C.* Filed June 13, 1952 in the District of Columbia Circuit (No. 11460)

4. *Matta Broadcasting Company* v. *F. C. C.* Filed June 13, 1952 in the District of Columbia Circuit (No. 11461)

5. *Radio Wisconsin, Inc.* v. *F. C. C.* Filed June 13, 1952 in the United States Court of Appeals for the District of Columbia Circuit (No. 11462).

6. *Peoples Broadcasting Company* v. *F. C. C.* Filed June 13, 1952 in the United States Court of Appeals for the District of Columbia Circuit (No. 11463).

The RCA appeal put into issue the validity of the grant to MacKay Radio and Telegraph Company, Inc. of a circuit to Portugal and the Netherlands. The remaining appeals raise the issue of the validity of the Commission's Sixth Report and Order lifting the so-called television freeze.

Respectfully submitted,

CLAIR L. STOUT, Chairman

## EMERGENCY AGENCIES

The purpose of the Committee on Emergency Agencies is to study the procedural aspects of the work of the various Federal Emergency Agencies, and to report and recommend to the National Committee of the Section. When the committee was first organized, under the chairmanship of Wendell Berge, Esquire, its members undertook a thorough study of the procedural regulations and practices of the more important Federal regulatory emergency agencies and also advised those agencies of the existence and objectives of the committee. Subsequently, through announcements made in various Bar publications, the committee advised the Bar of its existence and purposes and invited the submission to it of suggestions or comments with regard to the procedural policies or practices of emergency agencies.

This year the committee has continued to solicit the comments, problems and suggestions of the Bar-at-large in matters touching upon the procedural aspects of the work of the various Federal Emergency Agencies. Fundamental to the committee's work, and very existence, is the fact that the functions exercised under the Defense Production Act of 1950, as amended, by such agencies as the Office of Price Stabilization, the National Production Authority, the Wage and Salary Stabilization Boards, and others,

are excluded from the operation of the Administrative Procedure Act except as to the requirements of the Public Information Section thereof. The committee has held itself in readiness nevertheless, should occasion arise, to endeavor to secure observance of the spirit of the Administrative Procedure Act in the promulgation, application and enforcement of the procedural regulations of defense mobilization agencies.

The procedures and practices so far employed by the emergency agencies appear on the whole to have accorded essential fairness to persons whose rights are affected by the actions of those agencies, if the articulateness of the Bar be taken as a yardstick. There has been a paucity of complaints on procedural matters.

The committee has considered thoroughly and at length the desirability of enactment of S. 1770, the bill introduced by Senator McCarran during the 1st Session of the 82d Congress "to amend the Administrative Procedure Act, and eliminate certain exemptions therefrom." The committee's principal concern with the bill has been the way in which its enactment would affect emergency agencies. S. 1770 would repeal outright the exemption from the Administrative Procedure Act now found in the Defense Production Act; and, hence, would make the Administrative Procedure Act applicable across the board, insofar as by its own terms it would be applicable, to the various emergency agencies created to implement the purposes of the Defense Production Act.

It was the considered judgment of the committee that the result thus obtained would not be a desirable one. That judgment was based not only upon careful study and investigation on the part of the committee, both individually and collectively, but also upon the personal professional experience of the committee's members in dealing with such agencies as the Office of Price Stabilization and the National Production Authority.

A full statement of the views and conclusions of the committee with regard to S. 1770, as it would affect the so-called emergency agencies, is contained in a Special Report of the committee, appended hereto.

It is recommended that the Committee on Emergency Agencies be continued, with its principal duty the constant surveillance of proceedings and practices established by those Federal agencies which have been created under the authority of the Defense Production Act of 1950. The committee should not ignore the importance of comparable investigation of the practices and procedures of "old line" departments and agencies in connection with emergency powers delegated to them pursuant to the provisions of the Defense Production Act, nor should it be unmindful of the necessity for study of the procedural aspects of the work of agencies and departments deriving emergency powers through statutes other than that Act. But in final analysis the committee's labors can most profitably be expended upon the newer agencies such as the Office of Price Stabilization, the Wage and Salary Stabilization Boards, the National Production Authority, and others born outright of the Defense Production Act.

*Special Report on S. 1770*

It will be recalled that the objectives of the Committee on Emergency Agencies, stated broadly, are to study the procedures adopted by the emergency agencies which are established to administer the defense mobilization program, and to note any procedures or practices which do not accord essential fairness to persons whose rights are affected by the actions of such agencies.

The Committee, since its inception, has considered its principal duty to be the constant surveillance of procedures and practices established by those Federal agencies which have been created under the authority of the Defense Production Act of 1950. We have not ignored the importance of comparable investigation of the practices and procedures of "old line" departments and agencies in connection with emergency powers delegated to them pursuant to the Defense Production Act, nor have we been unmindful of the necessity for study of the procedural aspects of agencies and departments deriving emergency powers through statutes other than that Act. But in final and candid analysis the Committee's labors have been expended upon the newer agencies such as the Office of Price Stabilization, the Wage and Salary Stabilization Boards, the National Production Authority, and others born outright of the Defense Production Act.

The principal concern of this Committee, then, with the bill under consideration is the way in which the agencies I have named, and others of common statutory parentage, would be affected by its enactment.

Section 2(a)(10) of S. 1770 would specifically repeal "the first sentence of section 709 of the Defense Production Act of 1950" which provides that

> "The functions exercised under this Act shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof."

The repeal of the quoted sentence would make the Administrative Procedure Act applicable across the board, insofar as by its own terms it would be applicable, to the various emergency agencies created to implement the purposes of the Defense Production Act.

It is the considered judgment of this Committee that the result thus obtained would not be a desirable one. This judgment is based not only upon careful study and investigation on the part of the Committee, both individually and collectively, but also upon the personal professional experience of the Committee's members in dealing with such agencies as the Office of Price Stabilization and the National Production Authority

It is the sense of this Committee that indiscriminate application of the Administrative Procedure Act to the emergency defense programs would be likely to impede actions of essential emergency character and thereby interfere with preparations for defense to an extent incommensurate with the protections which the Act might afford to persons affected by the emergency regulatory powers.

It is doubtful whether any useful purpose would be served by lengthy analysis

and discussion of the arguments advanced by the emergency agencies themselves as to why, and how, the proper exercise of their extraordinary functions would, or might, be impeded should they be subjected to the procedural rigidities spelled out in the Administrative Procedure Act (aside, of course, from the requirements of section 3 thereof (Public Information), to which they are already, and properly, subject.) The views and arguments of the more important of the emergency agencies, especially the ones with respect to which this Committee is best qualified to speak, are easily accessible as a matter of public record. See Senate Report No. 627, 82d Congress, to accompany S. 1770, copy of which is attached for convenient reference. The opinions expressed in the communications there found from, for example, the Secretary of Commerce, the Assistant Solicitor of the Department of Commerce, and the director of Price Stabilization, are believed by this Committee to be, in the main, sound. The arguments of the agencies in favor of maintaining the present flexibilities of their procedures seem well-founded; and their objections, based largely on extremely practical grounds, to repeal of the exemption now found in the Defense Production Act, seem valid.

Nor is it believed that repetition of this Committee's views as stated in its last annual report would serve a useful purpose. Mr. Berge, then chairman, reported optimistically as to the essential fairness of the procedures of emergency agencies which had been scrutinized by the Committee. See Administrative Law Bulletin, 1951, Volume 3, No. 3. The only agency dealt with at length in that report was the Office of Price Stabilization—but OPS was then, is now, and promises for the future to be, one of the most important of the emergency agencies and one making its impact felt in every walk of life and every segment of the national economy.

As to the Office of Price Stabilization, there was included in the annual report a comprehensive memorandum prepared by Messrs. David Reich and Dean Dinwoodey of the Committee, in which the authors noted that "among all the emergency defense agencies, OPS has the most definitive and liberal procedure." The authors also stated that

> "* * * there appears to be a sincere disposition on the part of OPS legal officers to accord protestants every opportunity to make a case before the agency and in the record for any appeal to the Emergency Court of Appeals."

It should be observed, of course, that the memorandum to which I have referred was not intended as a study of the effect which repeal of the exemption found in section 709 of the Defense Production Act might have upon OPS procedures. Its conclusions are nevertheless most pertinent to the inquiry at hand, not only because of their general nature but also, and especially, because what was being considered was a proposed amendment to the Defense Production Act of 1950 requiring that hearings on protests under sections 407 and 408 of that Act be conducted in conformity with the provisions of sections 7 and 8 of the Administrative Procedure Act.

It must be borne in mind that sections 407 and 408 of the Defense Production Act do, by their own terms, entirely independent of the Administrative Procedure Act,

spell out a detailed and apparently fair procedure for the administrative handling of, and judicial review of agency action in connection with, protests lodged against regulations or orders relating to price controls. The elements of due process and fair play in that regard seem adequately present.

It must also be borne in mind that while the Office of Price Stabilization and related agencies are, under their blanket exemption from the Administrative Procedure Act, exempt from the requirement of section 4 thereof that they "shall afford interested parties an opportunity to participate in * * * rule making through submission of written data, views, or arguments * * *," they are by section 404 of the Defense Production Act required, so far as practicable, to "advise and consult with, and establish and utilize committees of, representatives of persons substantially affected by regulations or orders." And so that industry advisory committees may reflect varying points of view, section 701(b) of the same Act requires that in their formation, fair representation shall be granted independent small, medium, and large business enterprises, different geographical areas, trade association members and nonmembers, and different segments of the industry.

For these reasons, then, and for the reasons stated by the Director of Price Stabilization in his letter of July 23, 1951, to Senator McCarran (see the Senate Report to which reference has hereinbefore been made), and on the basis of our study of the OPS procedural rules and the manner in which those rules have been applied by the agency, the Committee feels that the exemption presently enjoyed by the Office of Price Stabilization should be continued in effect.

It is generally felt that of all the agencies exercising emergency regulatory powers under the Defense Production Act, the two which most immediately and personally affect our people and, consequently, in which there is the greatest need for observance of the spirit of fair play and fundamental procedural justice, are the Office of Price Stabilization (with its complementary Wage and Salary Stabilization Boards) and the National Production Authority.

With respect to the latter, the former having already been discussed, this Committee feels that in general there has been a genuine and conscientious effort to give reasonable consideration, through simple procedures, to the difficulties encountered by reasons affected by the regulations. In the NPA cases which have come to our notice, relief of an appropriate nature, by-and-large, has been afforded more quickly and probably with less cost in time and money than would have been the case had more formal procedures been utilized. Costs and delays almost inevitably incident to more intricate procedures would more positively assure formal due process, but the ultimate result might be so long delayed as to prejudice not only the effectiveness of the regulation but also the urgent need of the persons affected thereby, either for allocation of material or at least a final decision of denial or curtailment.

What has been said applies in general both to the initial issuance of generally applicable

regulations and to procedures for individual or particularized adjustments for hardships or other inequitable consequences of regulation. The urgent necessity for speed and flexibility of decision raises a substantial question as to whether the more informal procedures used by NPA are not likely to be more genuinely effective both in general regulation and in prompt adjustment in meritorious cases than a more elaborate procedure involving all the safeguards of the Administrative Procedure Act.

A former member of this Committee, in a well-reasoned but hitherto unpublished memorandum, has admirably summed-up our collective judgment as to the effect enactment of S. 1770 might have on the National Production Authority:

> "The administration of allocations and priorities to accomplish a fair distribution of scarce materials has seemed to me to be a process which requires frequent delicate adjustment to constantly varying factors of supply and demand. Procedures for making the necessary adjustments, if they are too complicated, and operate too slowly, might well defeat the effectiveness of the regulation and irremediably damage the individual enterprises whose operations are dependent upon not only the fairness but the promptness with which the allocations are adapted to changing supply and demand. It has been my impression that the [Administrative Procedure] Act's procedures are more suitable to situations where time is available to give deliberate and somewhat formal quasi-judicial consideration to individual cases, or even to general regulations, than to a program such as that administered by the NPA and that the formal requirements, designed to assure due process, which it imposes might well defeat their own ends and prejudice the interests of those the procedures are designed to protect, if applied to such a program."

For these reasons, then, our Committee feels that the exemption from the Administrative Procedure Act presently afforded the National Production Authority should be continued in force.

Proponents of S. 1770 inevitably call attention, of course, to those provisions of the Administrative Procedure Act which the Professional Staff Member, Senate Judiciary Committee, in his memorandum reproduced in the Senate Report on S. 1770, *op. cit. supra*, refers to as the "various exceptions and exemptions from its specified procedures when a certain functional operation or exigency requires expeditious process." The reference is usually—and properly, since it is with respect to the effect the bill would have upon speed and flexibility in the rule-making process that emergency agencies are most concerned—to so much of subsection 4(a) of the Administrative Procedure Act, relating to notice of proposed rule-making, as provides that said subsection shall not apply "in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reason therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"; and to so much of subsection 4(c), requiring the publication of a rule 30 days prior to its effective date, as permits an agency to provide otherwise "upon good cause found and published with the rule."

Unquestionably the Administrative Procedure Act was "designed with cognizance

of emergency situations," as the Judiciary Committee Staff Member has said, and there is "an intent to require only the exercise of reasonable discretion by the agencies in waiving requirements of the act for good cause shown." But it seems a useless, and indeed an unwise, gesture to subject agencies such as those herein discussed to the Act with full knowledge that wholesale and perhaps indiscriminate use will be made of the "escape" provisions. The battle for the Administrative Procedure Act was long-fought and hard-won; and the American Bar Association, more than any other group, should be jealous of it and zealous to protect it not only from unwarranted attrition and erosion, but also from mockery.

The Secretary of Commerce in his letter of July 16, 1951, to Senator McCarran reproduced in the Senate Report, *op. cit. supra,* called attention to the provisions in section 4 of the Administrative Procedure Act for waiver of the requirement of public notice where it is impracticable or contrary to the public interest and waiver of the 30-day waiting period for good cause found, and very frankly stated:

> "If the present exceptions were repealed, the Office of International Trade and the National Production Authority would, in my judgment, be required in the interest of national security to take advantage of these exceptions in the majority of cases. I should regret this, because it would appear contrary to the purpose and intent of the repeal of the exceptions, even though it would be following the original provisions of the Administrative Procedure Act."

There is ample reason to believe that other emergency agencies, too, would be inclined to make large-scale use of the "escape" provisions of the Act. In many instances there would be clear justification for invoking the discretionary exceptions, but the fear has been expressed—and to this Committee it seems a real danger—that the emergency agencies might be expected to avail themselves somewhat promiscuously of the "escape" provisions of the Act. This would be a serious threat to proper administration of the Act, and tend unquestionably to weaken it.

All-in-all, the Committee on Emergency Agencies, after considering the matter from every angle that has occurred to us and from every vantage-point that has been available to us, believes that it would be a mistake to repeal the provision of the Defense Production Act of 1950 which excludes the functions exercised under that Act from the operation of the Administrative Procedure Act. Perhaps the most pragmatic test of any procedure, or procedural rules, lies in experience. The Committee was organized more than a year ago, yet despite wide publicity as to its existence and objectives, including announcements in the American Bar Association Journal, the Bulletin of the Administrative Law Section, the Journal of the Bar Association of the District of Columbia, the District of Columbia Young Lawyer, and the Federal Bar Journal, there have not been called to its attention, nor has the Committee otherwise been made aware of, any procedures or practices of the emergency agencies that fail to accord essential fairness to persons whose rights are affected by the actions of such agencies. There has been some dissatisfaction, of course,

with the actions of many of the emergency agencies—but not on grounds of procedural unfairness, at least not on such grounds as application of the provisions of the Administrative Procedure Act might reasonably be expected to cure.

I am authorized to say that all members of the Committee on Emergency Agencies concur in this special report.

HARRY J. BREITHAUPT, JR.
Chairman

## FEDERAL HEARING EXAMINERS

The activities of this Committee through June 30, 1952, may be outlined as follows:

1. *Federal Trial Examiners Conference et al.* v. *Ramspeck et al.* This proceeding has been the subject of principal interest to this Committee this year. Your Committee has closely followed all developments in this case. Its outcome will have a controlling effect on the activity and work to be carried on by this Committee or its successor. The pendency of this proceeding has brought about a period of watchful waiting with a result that on the issues in litigation there necessarily has been a marking of time pending final results.

The United States District Court for the District of Columbia, on March 4, 1952, F. Supp. , held invalid the Regulations of the Civil Service Commission governing hearing examiners under Section 11 of the Administrative Procedure Act. This case was appealed to the United States Court of Appeals for the District of Columbia Circuit, where it was advanced on the Court's calendar and argued June 16, 1952. The opinion of the Court is anticipated at an early date.

The essential issues of this proceeding are:

(a) Whether federal hearing examiners are to be provided a status of independence which will assure impartiality between the agency and the citizen in the hearing and determination of cases of adjudication.

(b) Whether cases are to be assigned among hearing examiners within an agency in rotation. And,

(c) Whether there is to be within any one agency or major subdivision a multiple grading of hearing examiners, with the resulting multiple grading of cases and restricted assignment of cases within grades, and the resulting promotion system under substantial initiation and control of the agency.

There are the following possibilities:

(a) There may result a judicial interpretation of Section 11 of the Act which will assure the independent and impartial status of hearing examiners.

(b) In the absence of such interpretation and implementing regulations, this Section will be confronted with the question of reviewing the basic purposes of the Administrative Procedure Act in the matter of case adjudication and determining what course of legislative action may be necessary or desirable to achieve the intended objectives. The cognizant committees of Congress during this period have been content to let the matter proceed to the conclusion in the courts.

2. *Legislation.*

(a) *S. 2293.* Your Committee submitted comments and recommendations to the National Committee on this bill, which proposed to legislate a code of good conduct for administrative officers and employees, which legislation was in the form of Title II of the Administrative Procedure Act. Your Committee recommended against the contents of the bill in its present draft and against the merger of any such bill with the Administrative Procedure Act.

(b) *H. R. 5941.* Your Committee reported and recommended against a favorable consideration of this bill to the National Committee, which report and recommendation were circulated to its Board and members of the Council. This bill provided for the removal of hearing examiners in the same manner as other Government employees if the charge was based on disloyalty. Proceedings on such complaint, therefore, would be handled differently from the general requirement of Section 11 of the Administrative Procedure Act, which provides for the removal of hearing examiners upon agency complaint but with right of hearing on the record. It was the view of your Committee that the existing procedure was adequate and appropriate and that there is no requirement for any different legislation on this subject. Your Committee pointed out that the legislation contributed nothing to the problem of preventing the appointment of suspected disloyal persons as hearing examiners.

3. *Change of Committee Name.* Your Committee recommended a change in its name from "Selection and Qualification of Examiners and Personnel" to "Committee on Federal Hearing Examiners". This recommendation was favorably considered by the National Committee and members of the Council. It was felt generally that the new name is more descriptive of the purposes and activities of the Committee, which is concerned not only with the selection and qualification, but also with the status of hearing examiners, their independence, impartiality, tenure and proficiency, and the assignment of cases in rotation. The matters of principal concern to this Committee should be:

(a) The independent and impartial status of federal hearing examiners.

(b) The competency and proficiency of such examiners.

(c) The assignment and disposition of cases of adjudication.

(d) Procedures and qualifications of newly appointed examiners.

4. *Studies.* During the year we have commenced, through a subcommittee headed by Mr. Robert N. Denham, a study of possible legislation for consideration by the Section for strengthening the Administrative Procedure Act in the matter of status and qualifications of federal hearing examiners. The work is still in process.

DONALD C. BEELER
Chairman

*ADDENDUM—*

This year has marked the beginning and will doubtless see the end of litigation as to the status of trial examiners and the trial examiner system. In *Federal Trial Examiners Conference* v. *Ramspeck,* 104 F. Supp. 734 (March 4, 1952), the United States District Court for the District of Columbia, by Chief Judge Bolitha J. Laws, held invalid the Hearing Examiner Regulations of the Civil Service Commission as contravening Section 11 of the Administrative Procedure Act. This judgment on appeal was affirmed *per curiam* by the United States Court of Appeals for the District of Columbia Circuit July 16, 1952. It is expected as of this date (July 24, 1952) that the Government will seek review of this case before the United States Supreme Court.

Thus, the trial examiner system provided for by Congress in 1946 is in the course of litigation in 1952. Until the decision in this case is made final, there remains uncertainty and doubt. If the present decision stands, much work will be required toward reorganization of the trial examiner system. It will mean starting once more with the problem of devising a new and more complete body of regulations. If the decision is reversed, there is every indication Congress will reexamine the need for further legislation.

Actually, this sequence of events was forecast in 1946 committee reports on the Administrative Procedure Act—particularly in the matter of the trial examiner system. These reports contain an expression of hope that the federal agencies would deem it to be in their own best interests to foster and encourage an independent and impartial trial examiner system of qualified and competent hearing examiners. The agencies were urged to make a first, primary and far-reaching effort to comply with the terms and spirit of the Act, which Congress felt set forth only *minimum* requirements of fair administrative procedure. Failing realization of this hope, the committee reports pointed out that it would be the province of the courts to assure enforcement of the Act. The committee reports warned that if voluntary compliance or judicial enforcement failed to secure the minimum requirements, corrective legislation would be undertaken. Specific concern was registered over the possibility of resort to loopholes for avoidance of the examiner system. In this year, then, the trial examiner system is still within the shadow of events forecast in 1946. A clear and forthright resolution is within reach but not in hand.

There are three forces converging upon the same target. The *Ramspeck* case is a frontal assault going directly to the office of the trial examiner and to the status of the incumbent in that office. The second and allied thrust has reached the objective in individual case proceedings following the *Wong* case (*Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950)). These cases hold that in a proceeding which qualifies as a "case of adjudication" under the Administrative Procedure Act, the hearing—if presided over by an examiner (rather than the agency)—must be before a trial examiner appointed and qualified under Section 11 of the Administrative Procedure Act Thus, the rights of the parties in cases of

adjudication include the right to a hearing before a competent and duly-qualified statutory hearing examiner. Accordingly, in any such proceeding an issue may arise over the qualification of the presiding trial examiner and possibly over other requirements specified in Section 11 of the Act (e.g., due rotation of cases.) The third force is an instance of legislative action fortifying the trial examiner system. Public Law 554, approved July 16, 1952, writes into the Communications Act of 1934 certain purposes of the Administrative Procedure Act. This amendment withdrew the previous statutory authority of one or more individual commissioners to hear cases of adjudication, by providing that such proceedings be presided over by either the full commission or a duly qualified hearing examiner; it repealed statutory limitations on the types of cases which could be assigned to trial examiners; and it provided for a review staff to the commission but isolated its activity to cases of adjudication.

In the *Ramspeck* case, the District Court struck down the Civil Service Commission's five-grade spread of trial examiners, the grading of cases, a complicated promotion system, and a requirement of case rotation within grades only. In short, the Commission's Trial Examiner Regulations treated hearing examiners like any other Government employees, except for the removal proceeding and proficiency grading. The agencies were allowed to determine the existence of a vacancy, whether or not it would be filled, and how the vacancy would be filled (promotion being one alternative). The Commission provided for five grades of hearing examiners (11 to 15), with approximately 100 percent spread in salary. As a consequence of this five-grade, there was (or had to be) devised: a promotion system, a grading of trial examiners, a grading of cases to fit the grades of trial examiners, and (instead of case rotation insofar as practical, as provided by the statute) rotation of cases within each of the five grades. Case grading was in terms of moderately difficult and important, difficult and important, unusually difficult and important, exceedingly difficult and important, and exceptionally difficult and important. (The agency, moreover, was left with initiative in the matter of promotions, including the timing or withholding of the determination to fill a vacancy by means of promotion.) The opinion of the District Court held there was no statutory basis for multiple grade hearing examiners within any one agency. This by itself did away with the treadmill promotion procedure, the case rotation dilemma, and the essentially arbitrary grading of cases and hearing examiners by paper adjectives. (The citizen's case was graded by the Government, with no provision to participate, protest or review by the citizen.)

Of fundamental importance was the Court's holding that the Administrative Procedure Act, Section 11, has for its dominant purpose the "guarantee of even handed administrative justice". As a means of obtaining this dominant purpose, the opinion continued, "trial examiners are clothed with a distinctive professional status as impartial presiding officers over administrative cases of adjudication".

The trial examiner system as of this date has a membership totaling 325. Most ap-

pointments have been made from within the agency. The Civil Service register today lists some 70, 110, 200, 140 and 85 applicants for grades 15, 14, 13, 12 and 11, respectively. Allowing a 50 percent duplication for applicants for more than one grade, there are nearly 300 names of persons who have been graded and found qualified for appointment as trial examiners. It is estimated that to date there have been less than twenty-five persons appointed from without agencies. With this slow turnover, there is virtually no expectation of appointment.

The indications as of this date are that 1953 will be a year of decision. Preparatory work should commence with the alternatives of consolidating gains in the event of affirmance of the *Ramspeck* case, or formulating a new legislative approach to obtain an impartial and independent trial examiner system (presumably outside the auspices of the Civil Service Commission).

DONALD C. BEELER
Chairman

## IMMIGRATION

In the year just closed 1951-52 the Committee had one principal object: to study the deportation procedure and make (on behalf of the Association) appropriate recommendations to Congress in connection with pending legislation.

Sections 5, 7, and 8 of the Administrative Procedure Act (hereinafter APA) provide certain procedural safeguards "in every case of adjudication required by *statute* to be determined on the record after opportunity for an agency hearing." Such hearings must be conducted either by a member of the "agency" or a trial examiner qualified and appointed pursuant to Section 11 of the APA, but nothing was "to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." The hearing officer must not consult any "person or party" on any fact in issue; and "no officer engaged in the performance of investigative or prosecuting functions in the case or a factually related case shall participate in the decision."

At the time of the enactment of APA it was not clear whether Sections 5, 7, and 8 applied to deportation or exclusion proceedings. The immigration statutes have never provided expressly for hearing. But the Supreme Court in *The Japanese Immigrant* case (*Yamataya* v. *Fisher*), 189 U.S. 86 (1903), held that due process required hearing prior to deportation. An earlier draft of APA made Section 5 applicable to adjudications required by "law" to be determined after hearing. In *Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950), the Supreme Court held that since the Constitution required a hearing before deportation, the statute should be read as requiring one by implication. Thus Sections 5, 7, and 8 were applicable. But in the *Sung* case there was the further problem created by the provision in the Immigration Act that the "inspection of aliens" shall be conducted by "immigration inspectors" who shall have power "where such action may be necessary, to make a written record" of evidence. The majority of the Court never-

theless refused to hold that these "inspectors" were "specially provided" to conduct deportation hearings. In consequence such hearings must be conducted by APA trial examiners.

The Immigration Service thereupon represented to the Appropriation Committee of the House that it would need an additional $3,000,000 and ultimately $27,000,000 per year to hold hearings under APA. The Appropriation Committee recommended a rider (which was enacted) to the Supplemented Appropriation Act of 1951 completely exempting immigration proceedings from Sections 5, 7, and 8. This, of course, went much beyond the reinstitution of immigrant inspectors for APA examiners. It exempted the hearings entirely from the separation of functions safeguard. It does not appear, however, that the Immigration Service availed itself of the complete exemption. Its rules reflected many of the APA safeguards.

For some years a Congressional committee has been engaged in a general revision of the immigration and nationality laws. This has afforded the occasion for a reconsideration of the questions raised in this report. Last year Mr. Jack Wasserman, at that time the Chairman of our committee, appeared before the Congressional Committee on behalf of the Association. He urged that the deportation proceedings be governed by the principles enunciated in the *Sung* case. He questioned the cost figures of the Immigration Service. An overwhelming majority of the annual deportations are of Mexican laborers (the so-called "wetbacks") who have either entered without leave or overstayed. The Service estimated a half-day hearing in each of these cases. Mr. Wasserman made the point that very rarely has a wetback asked for a hearing. It was his opinion that there was little reason for supposing that the form of the procedure would determine the demand for hearings. But his main argument was that, in any case, the Association disapproved exceptions from the general provisions of APA in the absence of strong reasons calling for an exception, and that expense was not such a reason.

This year our Committee has restudied the problem. We took as our starting point the bill proposed by the Congressional Immigration Committee. This bill repealed the total exemption of the Appropriation Rider of 1951. It provided [Section 242 (b)] that a "special inquiry officer" should conduct deportation hearings. "No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated in prosecuting functions." Under these provisions deportation proceedings are thus subject in certain respects to Sections 5, 7, and 8 of APA including the important separation of functions safeguard. But the hearings would not be conducted by APA trial examiners. They would be conducted by special inquiry officers who may be serving interchangeably as prosecutors and investigators in other cases and who are generally subject to the supervision of the Commissioner and his staff.

Our committee interchanged views by correspondence and held one meeting in Washington on January 25, 1952. The meeting was attended by B. J. Habberton of the Im-

migration Service, F. B. Masino, Jack Wasserman and by the undersigned as chairman. The majority, Mr. Habberton dissenting, reaffirmed the stand taken by our committee the year before and accordingly disapproved the aforesaid provisions of the proposed bill. This conclusion was reached after thorough discussion. The essentials, however, seemed simple and relatively clear. We did not doubt the good faith of the Service nor its disposition to give fair hearings. We did not deny that the bill was an improvement on the Rider of 1951. But we returned to the fundamental proposition that the provisions of APA taken in their entirety represented a careful, well-considered view of the mimimal procedural protection needed in a trial involving accusatory elements. This was not less but indeed more true of deportation proceedings than of other proceedings to which APA is applicable. The interest of a person about to be deported is among the weightiest and most significant that can be imagined. In our opinion it was unsound to go below the minimum in this case; and it was destructive of the general purpose of APA to admit exceptions in the absence of a showing that the standard procedure was not feasible. Commissioner Habberton brought forward the arguments based on expense. But we were of the opinion that the estimate was exaggerated and in the last analysis it seemed that some added expense should be hazarded where there was in question such exigent claims to justice. We did not overlook the fact that the proposed bill did restore the APA provision for separation of function. But it is just at this point that the APA provision for independent trial examiners is significant. The separation of function is much more than a form; it enjoins an attitude of mind. It seemed to us that a special inquiry officer who was a prosecutor one day, and an examiner the next would be less apt to develop this attitude than an APA examiner. Even assuming, as may be the case, that the Service provides a corps of hearing officers who do nothing else, they will look to their superiors for promotion, as APA examiners do not.

Accordingly the chairman was authorized to communicate these views to the appropriate Congressional committees. After clearing with the Chairman of the Section, the undersigned sent letters to each member of the Senate Judiciary Committee. Later when the bill was being debated in the House, a similar communication was sent to every member of the House (copy attached to this report). We also called attention to other features of the bill which in our opinion violated acceptable procedural standards. One of these would deny a hearing to an allegedly overstaying seaman, the very situation in the *Sung* case in which a hearing was held constitutionally requisite.

The bill has now passed. We regret to state that with one minor exception our suggestions were not accepted. Our committee has had no opportunity to assess the present situation. In my opinion there is little possibility of a change until the new provisions have at least undergone a period of trial and observation.

LOUIS L. JAFFE
Chairman

*Appendix*

Law School of Harvard University
Cambridge 38, Mass.

AMERICAN BAR ASSOCIATION
Immigration Committee
Administrative Law Section

Dear Congressman:

The Committee respectfully urges the following amendments to H.R. 5678. First amend Section 242 b to provide for trial examiners appointed under Section 11 Administrative Procedure Act so as to restore Law as settled by Supreme Court in *Sung* case; because the American Bar Association is *firmly opposed to exceptions to the Administrative Procedure Act* and believes it is contrary to our traditions to discriminate against resident aliens.

For similar reasons we suggest the following amendments: amend 242 a to maintain present authority of courts to review denial of bail; amend 242 f to retain present right of hearing before deportation to alien previously deported; amend 242 so as to maintain present constitutional right of seaman to hearing before deportation.

Revise 360 to preserve the present satisfactory procedure for securing declaration of nationality; delete 342 providing for cancellation of certificates of citizenship with its unconstitutionally inadequate provisions for notice; amend 340 b in so far as it permits substituted service without any showing that personal notice cannot be made.

We urge these amendments in the belief that resident aliens, naturalized citizens, and citizens generally wherever they may momentarily be are entitled to the protection of fair procedure as established by the Constitution and the Administrative Procedure Act.

Very truly yours,
Louis L. Jaffe
Chairman, Immigration Committee
Administrative Law Section
American Bar Association

March 10, 1952

## IMPROVEMENT OF ADMINISTRATIVE PROCEDURES

This is a new committee of the Section, created after the 1951 annual meeting to consider "suggestions made for improving the administrative process which would not take the form of amendments to the Administrative Procedure Act." Some such matters have been assigned to us by the Chairman of the Section, and others have originated within the Committee. Except for one matter, to be mentioned at the end of this report, the Committee has worked through subcommittees.

The Subcommittee on Uniformity of Rules of Procedure and an Office of Federal Administrative Procedure (Mr. Fuchs, Chairman, and Messrs. Hoyt, Nathanson and Stern) has completed the first part of its assignment by preparing for the Committee a Report on Uniform Rules of Procedure. A subcommittee draft was discussed at a meeting held in Washington on May 24, and the report in final form (incorporating changes made as a result of that discussion) was thereafter circulated to the full Committee for comment. All the members of the Committee who have been heard from, being three-fourths of the full Committee membership, have approved the re-

port. It is therefore submitted herewith as the full Committee's report. Briefly, it recommends that the Section oppose the enactment by the present Congress of S. 17 (which has passed the Senate and is now under consideration by the Judiciary Committee of the House of Representatives) and suggests other means of accomplishing the purposes of the resolution adopted by the Section on September 18, 1951, which approved "in principle the desirability of exploring the possibility of securing some uniformity in rules of federal administrative procedure" and suggested that any body created for that purpose "be so constituted as to make adequate provision for the complete representation thereon of administrative agencies and the legal profession". The subcommittee has deferred action on the second part of its assignment, consideration of an Office of Federal Administrative Procedure as recommended in the 1941 report of the Attorney General's Committee on Administrative Procedure.

The Subcommittee on a Nisi Prius Administrative Court (Mr. Hopkins, Chairman, Mrs. Myers and Messrs. Bouck, Eder, Frank, Logan and Pirie) has to deal with a subject which is quite different from the subject-matter of the report of the 1950-1951 Committee on the Administrative Court Proposal (Section Bulletin, Vol. 3, No. 3, pp. 78-93). That committee disapproved a proposal for a specialized court of general jurisdiction for the judicial review of administrative agency action. The subject-matter of this subcommittee's consideration is, as its title indicates, the possible desirability of adjudication by a special court or courts of matters now subject to initial adjudication by administrative agencies. That subject was given considerable study by the Association a number of years ago; but the passage of time, and the development of administrative law since, appear to make it a useful subject for present reconsideration. It is apparent that this is a long-range job; and the subcommittee reports that, while it is at work on the subject, it will merely be able to lay the groundwork at this time and will have no definite recommendations before the Section's September meeting.

The Subcommittee on Binding Administrative Rulings (Mr. Newman, Chairman, and Messrs. Clarkson and Richter) has been studying the desirability of extending to other fields the principles of Sections 9 and 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. §§ 258-9), which provide that employers who in good faith rely on certain administrative rulings under the Wage-Hour Act cannot later be held liable or punished for conduct in conformity with those rulings. The subcommittee reports as follows:

> "These sections have been in effect for nearly five years, and our subcommittee has considered the question whether parallel legislation might be desirable to protect people who in good faith rely on rulings involving other regulatory statutes. Some federal agencies on their own initiative have provided such protection [e.g., see OPS Price Procedural Regulation No. 1, 16 Fed. Reg. 4974 (1951)]; and we have corresponded with most of the other major agencies, inquiring as to comments they might have regarding such a proposal.
>
> We are now engaged in drafting a bill that will reflect certain tentative conclu-

sions, and our hope is that this will be ready for consideration by the full committee prior to the meeting of the Association in September, at San Francisco."

It seems doubtful that the full Committee will have a proposal to make to the Section at its September meeting; but the Committee should be able to come to some conclusion during the following year.

The Subcommittee on Pre-trial Procedure in Administrative Proceedings (Dean Stason, Chairman, and Messrs. Lasher, Miller, Muse and Withrow) has undertaken a study originally suggested by Judge Alfred P. Murrah, of the Tenth Circuit, Chairman of the Pre-trial Committee of the Judicial Conference of the United States. This subcommittee's present activity is directed primarily towards putting on a program on its subject as part of the Section's September meeting. Meanwhile it is engaged in investigating present practices in various agencies; and its work may well result not only in a September discussion program, but in a report next year.

The Subcommittee on the Finality Clause in Government Contracts (Mr. Law, Chairman, and Mr. Hitchcock) is dealing with questions raised by the decision of the Supreme Court in *United States* v. *Wunderlich*, 342 U. S. 98,—questions as to the desirable content of the "finality clause" and the desirable scope of judicial review. Following the *Wunderlich* decision a number of bills have been introduced in the Congress, and the subcommittee's work includes an appraisal of these proposed legislative solutions as well as consideration of the possible desirability of others. In view of the particular character of these questions and the necessity of dealing with detailed variations in the proposed legislative solutions, it has been thought best that this subcommittee should not report through the full Committee, but should instead work directly with the Vice-Chairman of the Section and the Chairman of the National Committee who, like the Chairman of the subcommittee, are in Washington.

It was mentioned at the outset that on one matter the Committee has not worked through a subcommittee. One of the important functions assigned to the Committee was to participate in behalf of the American Bar Association, either directly or through the officers, Council or National Committee of the Section, in a proposed Conference of Representatives of the Administrative Agencies, if the President calls such a conference in pursuance of the recommendation made last September by the Judicial Conference of the United States. As finally made (after representations by the Section), that recommendation was for the inclusion in such a conference of representatives of the Bar as well as representatives of the administrative agencies. The proposed conference has not yet been called, and it may be that it will be deferred until next year. Meanwhile, however, the Committee has been engaged in considering the reports of the committees of the Judicial Conference on which its recommendation to the President was based, and other matters that might usefully be taken up when such a conference is held, including the problem of uniformity of rules of administrative procedure.

As will be seen from the above, most of the Committee's work (other than the final

Report on Uniform Rules of Procedure, submitted herewith) is still in preliminary stages. More will be done by September, but much will still remain to be done on most of the subjects under consideration. This is due in part to the time necessarily consumed in organizing a new committee, and in part to the fact that some of our subjects of study are long-range in character.

Respectfully submitted,

ROBERT M. BENJAMIN
Chairman

Dated: July 1, 1952.

## SPECIAL REPORT ON UNIFORM RULES OF PROCEDURE

The Committee on Improvement of Administrative Procedures recommends to the Section of Administrative Law that it take steps to oppose the enactment by the present Congress of S. 17, which has passed the Senate and is now under consideration by the Judiciary Committee of the House of Representatives. This recommendation is not based upon opposition to the goal of S. 17, which is to bring about the greatest feasible uniformity in the rules of practice of federal administrative agencies. Our belief that the passage of S. 17 would be unfortunate is based on (1) the pendency at this time of a proposal for consideration of improvements in federal administrative procedure on a broader basis and (2) undesirable provisions in S. 17 which we believe it would be impracticable to attempt to have eliminated during the life of the 82nd Congress.

The Judicial Conference has recommended to the President that a conference of representatives of federal administrative agencies and of the Bar be held for the purpose of considering improvements in agency procedures. The Section of Administrative Law has joined informally in this proposal, which we believe to be sound. The subject of possible uniformity of rules of practice is intimately connected with other problems of administrative procedure and should, we think, be considered along with them, probably through a subcommittee or staff committee of the conference of agency representatives. We believe it would be appropriate to urge upon the Judiciary Committee that legislative action affecting administrative procedures beyond those of a single agency be deferred until the Executive has had full opportunity to consider its own problems, unless Congress itself is prepared to authorize a broad study. A study under executive auspices is more likely to take place in 1953 when a new administration takes office than it is at the moment.

In the absence of an over-all inquiry into problems of administrative procedure, the establishment by statute of a Commission such as is proposed in S. 17, or of any other official agency to bring about uniformity in rules of practice, ought at least to await the assembling of data to establish the extent of the need for uniformity and the feasibility of meeting that need. So far as we know, data on this subject have not been gathered. The desire for uniformity in rules of practice stems from the justified demand of members of the Bar for the greatest simplicity and general improvement of procedure possible; but the extent of the

inconvenience resulting from lack of uniformity and the degree to which uniformity and improvement can be brought about have not been indicated. A subcommittee of this committee is undertaking a modest study of the subject; but more adequate inquiries under official auspices, such as a conference of agency representatives might inaugurate, would clearly be desirable.

Any official body, statutory or other, established to deal with uniformity of rules, should be charged primarily with studying the problem and determining the feasibility and possible degree of uniformity before drafting any rules, rather than with formulating and transmitting "general rules of practice and procedure for agencies, including forms", as S. 17 now puts it. Although the Senate Committee report gives assurance that uniformity is to be sought only to the extent practicable, we think that, if legislation is to receive further consideration at this time, the bill should be recast accordingly. The Section of Administrative Law at its meeting last September took this position.

If statutory means of securing uniformity in rules of practice are to be undertaken, we believe several other fundamental changes should be made. The Section has suggested that any committee created for the purpose of dealing with the rules of practice should "be so constituted as to make adequate provision for the complete representation thereon of administrative agencies and the legal profession." The Commission now proposed in S. 17 would consist of four members of the Senate and House Judiciary Committees; an Assistant Attorney General; a senior judge of a judicial circuit; and an agency head, a law school dean, and a practicing lawyer, designated by the President. It will be noted that only one, or at most two, of the members of the proposed Commission would be representative of administrative agencies; and only the practicing lawyer and possibly the law school dean could be regarded as representative of the practicing Bar. Clearly a change in this regard would be necessary to make the bill acceptable.

The provision of S. 17 for placing the uniform rules in effect is for the Commission to report through the Attorney General to Congress and for the rules to become law ten days after the adjournment of the session at which the report is made, unless previously disapproved by concurrent resolution. This method is the same as that which was applied to the federal Rules of Civil Procedure and Rules of Criminal Procedure. Here, however, the rules would come, not from the branch of government to be bound by them, but from an independent statutory commission. We believe that before rules formulated by such a commission become effective through legislative action (assuming such action to be appropriate), they should receive the concurrence of the Chief Executive in advance of submission or be given the legislative consideration accorded to a bill, including submission to the veto power of the President.

It should be pointed out, also, that the large representation of the Legislative Branch on the Commission proposed in S. 17, falling just one short of a majority of the Commission, seems excessive and should be altered even if other changes are not made. It would be too much to expect that

Judiciary Committee members, burdened as they are with a multitude of legislative problems, could participate continuously and effectively in the work of the Commission; and their power in relation to matters essentially administrative should in any event be less immediately applicable than S. 17 makes it.

For the foregoing reasons we oppose the enactment of any bill now, and urge that attention be given to the problem of uniformity of rules through the broader approach to problems of administrative procedure which is presently contemplated. If legislation is nevertheless to be enacted at this session, we think the Section should urge at least the changes necessary to deal with the matters covered in this report.

ROBERT M. BENJAMIN
Chairman.

June, 1952.

## NATURAL RESOURCES AND INTERIOR AFFAIRS

*Activities for the Year 1951-1952*

Our accomplishments for the year 1951-1952 consist of one report, recommending that no position be taken, on one minor legislative proposal (S. 2543; H. R. 6035).

This is so small a result for the effort involved in establishing a committee of able and alert attorneys that both the Administrative Law Section and the Members of this Committee are entitled to (1) an examination of the reasons for this uninspiring achievement, and (2) my recommendations for ways to avoid it in the future.

*Reasons for Inactivity*

There seem to me to be three reasons for the small results of this Committee:

1. *Time.* It was, in the first place, organized too late. The time schedule ran as follows:

Nov. 26, 1951: I was asked to be chairman subject to announcement after Section membership approved

Nov. 28, 1951: I accepted

Jan. 4, 1952: I was asked for a progress report

Jan. 9, 1952: I reported that so far as I knew I was not yet Chairman or Section member

Jan. 15, 1952: I was advised I had been both since November

Jan. 25, 1952: Committee members suggested to Chairman of Section

Feb. 6, 1952: Letters of invitation sent by Section Chairman

Feb. 25, 1952: I advised Chairman I had heard from some but not from the others

Mar. 26, 1952: Inquired of Chairman whether we had a committee

Mar. 28, 1952: Advised by Chairman of acceptances from others

May 16, 1952: Request by Chairman for report of year's activities, before July 1.

With the advantage of hind-sight, I can see that I should have been active from December 1 onward. I list this chronology against the event that the next chairman should be one who, like me, postpones Committee work until it is plain that he has to do it.

2. *"Procedure."* This Committee, probably more than most, is hobbled by the limitation that it is to study and report on

"procedural aspects" of matters within its field. On the one hand, the Administrative Law Section is concerned with procedure not substance. On the other hand, very little of the natural resources field of law is concerned with procedure in place of substance. We could perhaps have found or created a few procedural issues. But, again, men go on committees to do work that has to be done, not to make work that doesn't have to be done.

3. *The Practitioners' Habits.* All the men on this Committee are in active practice. Each, I imagine, has to choose each day which of his problems is the more pressing. This circumstance does not prevent work on a job that someone asks be done; it does, for the ordinary man, prevent a contemplative inquiry into whether there is any job that ought to be done.

By way of illustration, on April 2 I requested each Committee member to advise me "whether he has any project in mind to which the Committee ought to turn its attention." Only 3 of the 9 members had. By way of further illustration, I did nothing about these suggestions—not because they weren't good, but because they weren't described as urgent.

*Recommendations*

This analysis of the reasons for the negligible accomplishments of the Committee lead me to the following recommendations:

1. *The Committee Isn't Needed.* There are procedural problems in the field of Natural Resources and Interior Affairs. But they are so few (especially with gas and electric power—the regulatory side of natural resources—a separate committee) that it does not seem to me to be necessary to have a special committee to deal with them.

The National Committee, the Gas and Electric Power Committee, the Administrative Practitioners Committee, the Administrative Procedure Act Committee, and the Committee on Improvements in Administrative Procedure, seem to me ample both in number and in jurisdiction to cover the Natural Resources and Interior Affairs Field.

My major recommendation, then, is the elimination of this Committee. In the event that recommendation is not followed, I have three subsidiary recommendations.

2. *Prompt Organization.* The committee should be organized in early fall and should be advised of its life-span. Pains should be taken to ensure that its chairman knows of acceptances and rejections by those asked to serve. He should then, if as at present he be an unenterprising fellow, be given a strong push or two to get down to work.

3. *Suggested Program.* I believe that if the Section or the National Committee wants the aid of a committee such as this they ought to be able to formulate some of the reasons why. If the Committee has a job to do, it should be told of its nature and actively urged to do it.

I list for the benefit of my Section superiors or of my successor the four projects suggested to me by Committee members or others which seemed to fall within our field of activity:

a. Mr. Joel D. Wolfsohn of the Interior Department suggested on May 14 that the Committee study the desirability of proposing to the Congress that the land

laws be codified and modernized. (I consider this a worthy project, and one where the A.B.A. has a useful role to play. I did nothing because the Committee's end was too near at hand.)

b. Mr. Shaw suggested on April 7 maintaining liaison with the drafters of the codification of the Reclamation Laws, and with the drafters of the legislation recommended by the Water Resources Policy Commission. (A sound suggestion not followed up by me simply I fear because non-urgent.)

c. Mr. Lowry suggested on May 28 examination of the provisions of the Bureau of Reclamation water contracts making the Secretary the final arbitrer of all disputes. (Comment as in b above.)

d. Mr. Kirgis suggested an examination of S. 1149, transferring functions including oil and gas matters from the Bureau of Land Management to the Department of Agriculture. (Comment as in b above.)

4. *The Place of the Committee.* Finally, if the Committee is to be continued, it ought to be advised exactly what are its powers and its place in the Section and the Association. I close my term without yet knowing our relationship to the National Committee, the Section Council or the Section Chairman and Vice Chairman, or their relations among themselves, or to the Bar Association. Our Committee is supposed I gather to report to the National Committee. But I don't know to whom on that Committee, whether we can report to or communicate with anyone else, or how we go about getting anywhere if we had some place we wanted to go. A more knowledgeable chairman of this Committee would know these things as a matter of course. A more effective Chairman would have got to the point he wanted to get something done, and then would actively have searched out the answers to these jurisdictional matters. But it would still seem useful to advise my successor of these matters at the outset of his term.

*Conclusion*

Our record is one of nothing accomplished. In some measure, as indicated above, this was almost inevitable; for that reason I recommend the elimination of the Committee. In some measure, improved organizational procedures and directions, as recommended above, could improve the results. For the rest, I fear I must myself accept responsibility for an insufficiently aggressive conduct of the affairs of the Committee.

I have felt that because of its nature this ought to be a personal rather than a Committee report. I have nevertheless circulated it among the nine committee members and can report that two of its members agree that the Committee could well be eliminated; and that two others feel that it has a job to do. All agree that the procedural recommendations made above should be adopted.

WARNER W. GARDNER
Chairman

## ORGANIZATION AND BY-LAWS

In accordance with the agreement of Council at the February meeting, the Committee on Organization and By-laws has drafted the following amendments to the By-laws of the Administrative Law Section for submission at the annual meeting this fall.

The first amendment proposed by your Committee is to Article II, Section 1, of the By-laws, which raises the annual dues from $3.00 to $5.00. The recommended amendment is as follows:

> Section 1. Each member of the Section shall pay to the American Bar Association annual dues of five dollars. Any member of the Association, upon request to the Secretary of the Association and upon payment of dues for the current year, shall be enrolled as a member of this Section. Thereafter said dues shall be paid in advance each year beginning on the July first next succeeding such enrollment. Any member of this Section whose annual dues shall be more than six months past due shall thereupon cease to be a member of this Section. Members so enrolled and whose dues are so paid shall constitute the membership of this Section.

The second amendment to the Section By-laws proposed by the Committee on Organization and By-laws is designed to change the terms of office of the Chairman, the Vice-Chairman, and the Secretary from one to two years. Although it was suggested that the amendment provide for a two-year term for Chairman, the Committee also has provided that the terms for Vice-Chairman and Secretary be for two years. We felt that since the Vice-Chairman has always been considered an understudy for Chairman, it would be appropriate to have his term the same length as that of the Chairman. We understand that Council only discussed changing the length of the Chairman's term.

We checked informally with Association headquarters to see if the By-laws of any other sections provided for two-year terms for officers, particularly for the office of Chairman. The terms all seem to be for one year; however, some sections have repeatedly re-elected the same person as Chairman. There appears to be no prohibition against a two-year term, but most sections seem to follow the pattern set by the Association, and provide for a one-year term.

It occurs to us that, while the Section may wish to follow a policy of having a Chairman serve two years and preserve continuity, it might be well to accomplish this simply by re-election rather than through incorporation in the by-laws. While there undoubtedly is an advantage in having an experienced Chairman continue in office, we conceivably could be confronted with difficulty in finding someone who could give two years to the Chairmanship.

The proposed amendment to Article III Section 3, changing the terms of office of the Chairman, the Vice-Chairman and the Secretary, reads as follows:

> Section 3. The Chairman, Vice-Chairman and Secretary shall be nominated and elected in the manner hereafter provided, and shall hold office for a term of two years thereafter, and until their successors shall have been elected and qualified: Provided, That, the Chairman, Vice-Chairman, and Secretary nominated and elected at the annual meeting at which this amendment to the By-laws of the Section of Administrative Law shall be adopted shall hold office for the term of two years specified in this amendment, in the event such amendment becomes effective upon approval of the House of Delegates in accordance with Article IX of these By-laws.

You will also note that provision has been made in Article III, Section 3, for the election of officers for two year terms at the coming meeting in San Francisco, subject to the approval of these amendments to the By-laws by the House of Delegates in accordance with Article IX.

To implement the amendment to Article III Section 3, it is necessary that amendments be made to Articles IV and VI. It also occurred to us that there should be something in our By-laws regarding the selection of the Section Delegate to the House of Delegates. Article VI, Section 6 of the Constitution of the Association covers this, but we feel that the By-laws should contain a provision for the nomination and election of our Delegate. Accordingly, a revision of Article IV of the Section By-laws is proposed as follows:

Article IV: Nomination and Election of Officers and the Section Delegate.

Section 1. *Nominations.* At the first session of the annual meeting the Chairman shall appoint a Nominating Committee of three members of the Section not members of Council, which Committee shall make and report nominations to the Section each even-numbered year for the offices of Chairman, Vice-Chairman, Secretary and Section Delegate and each year for members of Council, to succeed those whose terms will expire at the close of the then annual meeting and to fill vacancies then existing for unexpired terms except in the case of the Section Delegate whose selection is made by Council in accordance with Article VI, Section 3 of these By-laws. Other nominations for the same offices may be made from the floor.

It is further recommended that Article VI, Section 3 be amended to read as follows:

Section 3. If a vacancy occurs in any office after the person has been duly elected and qualified, the Council may fill such vacancy and the person so selected to serve until the next annual meeting except in the case of the Section Delegate who shall serve for the remainder of the term.

Under the amendment to Article III, Section 3, the term of office of the Chairman, Vice-Chairman, and Secretary will be two years, and the amendment to Article VI, Section 3, is designed to permit the Council to fill vacancies in any office until the next annual meeting, at which time the Section itself will elect a person to hold the office for the remainder of the unexpired term of office in which the vacancy occurred. As was indicated above in the Section Delegate, we necessarily are governed by Article VI, Section 7 of the Constitution of the Association.

In accordance with Article IX of the By-Laws, after the foregoing amendments are approved by the Section, the Section should take the necessary action to secure the approval of the House of Delegates.

LOUISA WILSON
Chairman

## SECTION DEVELOPMENT

Approximately twenty persons are serving on this committee which was organized late in the year. A campaign to increase the membership of the Section is underway, but it is too early to give a report on the results of the campaign.

HAROLD L. RUSSELL
Chairman

## STATE ADMINISTRATIVE LAW

### A. Summary

Intensified interest in the regulation of administrative procedures of state agencies, and a wide-spread conviction that such regulation should be by way of uniform procedural codes, were indicated by a survey made by the committee on state administrative law.

During the year, Michigan has joined the ranks of the States having general administrative procedure acts with comprehensive coverage more or less similar to that of the Model Act promulgated by the Commissioners on Uniform State Laws.[1] The Michigan Act (Act. No. 197, P.A. 1952), while it exempts a number of agencies having well-defined procedural requirements, sets a pattern for the remaining agencies which in general quite closely parallels the Model Act. Arizona enacted, this spring, an Administrative Procedure Act relating chiefly to the exercise of rule-making powers (1952 Laws, Ch. 97).

In at least four other states—Kentucky, New Jersey, Idaho and West Virginia—proposals for administrative procedure codes are reported to have been receiving legislative consideration during the current year; and in at least five more states (Arkansas, Georgia, Oklahoma—where an administrative procedure bill was vetoed in 1949—Oregon, and Texas), special committees of the Bar are sponsoring such legislation.

As noted in the 1952 edition of the "Book of the States" published by the Council of State Governments (p. 147), "In the past two years, State governments have shown unparalleled interest in re-examining their administrative agencies and establishments." Thirty-three states have set up "little Hoover" commissions to study the feasability of state administrative reorganization. While the attention of many of these commissions is directed primarily to matters going beyond the field of administrative procedure, their activities have stimulated what Professor Ferrel Heady has found to be a wide-spread movement sponsoring general laws to control administrative procedures.[2]

### B. Committee's Survey of State Administrative Law

In an effort to measure the current results of this wide-spread interest, and to obtain a cross-section of representative opinions as to the desirability of various legislative proposals, the Committee developed a somewhat extensive questionnaire which was sent to committee members in

[1] At the beginning of 1952, such States included California (Gov't. Code, Secs. 11370—11445; 11500—11528; Indiana (Burns Stat. Secs. 60-1506; 63-2423); Missouri (Rev. Stat., Secs. 536.010-536.140); North Dakota (Rev. Code, Secs. 28-3201—22); Ohio (Gen. Code, Sec. 154-61—154-73); Pennsylvania (71 Penn. Purdon Stat. 1701.1-51); Wisconsin (Stat., Secs. 227.01—21). In addition, Illinois had an Administrative Review Act (Jones Stat. Sec. 104.094).

[2] Heady "Administrative Procedure Legislation in the States", published by Bureau of Government, Institute of Public Administration, University of Michigan (1952)—a valuable and detailed survey of developments in six representative States where programs for improvement of administrative procedure have been instituted in the last few years).

each of the 48 states in January, 1952. Replies were received from 32 states.[3]

The remainder of this report is a brief analysis of the results of this study. It is contemplated that a more detailed account may be published later.

*1. Acceptance of Principles of Model Act*

The questionnaire showed a general acceptance of the principles set forth in the Model Administrative Procedure Act. While many of the state representatives on the committee indicated a belief that various provisions of the Model Act should be modified in one way or another to meet the situations in their particular states,[4] an overwhelming majority indicated that in their opinion, the proper approach to the problem of regulating state administrative procedure was to provide, by statute, rules of practice and procedure which would be generally uniform with respect to all agencies covered by such act, as contrasted with the approach that would permit each agency to devise its own procedures and rules of practice. Representatives of twenty-four states indicated that they favored the former approach, while only four state representatives believed that each agency should be permitted to devise its own procedures and rules of practice. The remaining four state representatives answering the questionnaire expressed no opinion with respect to this question.

In view of the wide interest which has been aroused in the provisions of the California Statute (B & P Code 110.5; Government Code 11502) providing for a "pool" of administrative hearings officers to be assigned from time to time to various agencies, the state representatives on the committee were asked to express their opinion as to the desirabiilty of such a provision in their respective states. On this question, twenty-six state representatives expressed themselves as being opposed to such a provision, while three members favored it (with some reservations) and the other three representatives expressed no opinion.

*2. Rule Making Requirements*

The answers to the questionnaire indicated that in addition to the comparatively few states which have enacted comprehensive administrative procedure acts, a number of other states have enacted legislation comparable to the provisions of Section 2 of the Model Act requiring agencies to adopt, after notice and opportunity for expression of views, rules of procedure governing their formal and informal procedures. Such statutory provisions were reported to exist (in some states, the requirement is applicable only to certain designated agencies) in the following fourteen States: Ariz., Calif., Ind., Iowa, Idaho, Mich., Nev., N. H., N. D., Ohio, Penna., Tenn., W. Va., and Wisc.

[3] Replies from the questionnaire were received from the following states: Ala., Ariz., Ark., Calif., Fla., Idaho, Iowa, Kan., Ky., La., Maine, Md., Mich., Miss., Mo., Nev., N.H., N.J., N.D., N.Y., Ohio, Okla., Ore., Penna., R.I., S.C., Tenn., Texas, Vt., W.Va., Wisc., Wyo.

If replies had been received from the other 16 states, they would probably have shown the existence, in various additional jurisdictions, of legislation comparable to the statutory enactments hereinafter catalogued.

[4] The Commissioners on Uniform State Laws promulgated the Act as a Model Act rather than a Uniform Act for the very reason that it was recognized that many of the procedural details involved in administrative action must necessarily vary from state to state.

On the question as to desirability of enactment of a generally applicable requirement prescribing adoption of agency rules of procedure, representatives of twenty-three states expressed an opinion that such a requirement would be desirable, three felt it would not be desirable, and the remaining six state representatives expressed no opinion.

Similarly, the principle embodied in Section 3 of the Model Act, requiring each agency to file with the Secretary of State certified copies of its rules, has met legislative acceptance in a large number of states which have not adopted any general legislation covering administrative procedure. Answers to the committee questionnaire indicated that filing requirements exist as to some or all agencies in at least twenty-three states: Ala., Ariz., Calif., Fla., Idaho, Indiana, Ill., Iowa, Kansas, Ky., Mich., Md., Mass., Mo., Nev., N. J., N. Y., N. D., Ohio, Okla., Penna., Tenn., Wisc. There appeared to be no disagreement among the state representatives as to the desirability of such legislation. Eighteen representatives expressed themselves as favoring the adoption of a requirement for the filing of rules and there were no expressions of a contrary opinion.

Again, there has already been considerable acceptance by the states of the principle set forth in Section 4 of the Model Act requiring an appropriate state officer to publish compilations of agency rules at specified intervals. Such statutory provisions are reported to exist in at least ten states including: Calif., Ind., Iowa, Ky., Md., Mo., Mich., N. Y., Ohio, Wisc. New Jersey reports a constitutional requirement that the legislature provide for prompt publication of administrative rules, but this constitutional requirement has not yet been implemented by statute.

On the question as to the desirability of such a statutory provision, sixteen state representatives favored such a proposal, two were opposed, and the remaining members expressed no opinion.

Many comments were received from state representatives indicating the difficulty of ascertaining the rules of state agencies, in the absence of periodical publication. It was reported that in Oregon, where such a statute was repealed in 1941, there has been no publication of administrative rules during the last decade. In other states having no such requirement, difficulty was reported as a result of the circumstance that a rule adopted by an agency would not be followed after the personnel of the agency had changed.

No report was received as to the existence in any state (outside of those having general administrative procedure acts) of legislation requiring agencies to establish procedures for consideration of petitions seeking the adoption, amendment, or repeal of agency rules, in accordance with the principle set forth in Section 5 of the Model Act. A majority of the state representatives felt that such a provision would be desirable; but this proposal did not meet with the enthusiastic acceptance which was expressed for other provisions of the Model Act. Representatives from fourteen states expressed a desire to see such legislation on the books in their states, while six were opposed to such a proposal, and the remaining twelve expressed no opinion.

### 3. *Declaratory Judgments*

Answers to the Committee's questionnaire disclosed no states, outside of those with general administrative procedure acts, having statutory enactments specifically authorizing the state courts to render declaratory judgments as to the validity of agency rules. In many states, of course, a general declaratory judgment act has been adopted, but there remains some uncertainty in those states as to the circumstances under which the state courts will entertain petitions for declaratory judgments respecting the validity of agency rules. Answers to the questionnaire indicated that in the opinion of the state representatives in Fla., Iowa, N. J., N. Y., Mass., and Tenn., the state courts would (in various circumstances) entertain such declaratory judgment petitions. However, it was reported that the availability of declaratory judgment proceedings to test the validity of agency rules was unsettled or doubtful in sixteen states. The state representatives accorded a hospitable reception to the principle enunciated in Section 6 of the Model Act, authorizing such declaratory judgments. Eighteen felt that such a provision would be desirable, while only two were opposed.

No advice was received of the existence in any state (outside those having general administrative procedure acts) of statutory provision respecting the issuance of declaratory rulings by agencies as contemplated by Section 7 of the Model Act.

Notwithstanding the lack of statutory authority, it was reported that various agencies in at least the following twelve states from time to time issue informal declaratory rulings: Ala., Ark., Calif., Md., Mass., Mich., N. J., N. Y., Ohio, Ore., S. C., Tenn.

An overwhelming majority of the state representatives expressed themselves as favoring the enactment in their respective states of a provision comparable to that found in Section 7 of the Model Act authorizing agencies to issue declaratory rulings which would be binding and subject to judicial review. Affirmative votes on this question were received from twenty-three states, while four were opposed, and the remaining five expressed no opinion.

The state representatives were also asked whether they would favor a provision (going further than the Model Act) *requiring* agencies to issue declaratory rulings on proper petition. As to this, most of the representatives felt that the issuance of declaratory rulings should be vested in the discretion of the agency. Representatives of eight states favored a requirement that agencies *must* issue declaratory rulings, while representatives of sixteen states were opposed, and the remaining eight expressed no opinion.

### 4. *Notice and Opportunity for Hearing*

The reasonableness of the provision in Section 8 of the Model Act (requiring that in any contested case all parties shall be afforded an opportunity for hearing after reasonable notice) is indicated by the fact that at least twenty states have enacted statutes, applicable to varying numbers of agencies, and incorporating requirements as to notice and opportunity for hearing intended to achieve the objective contemplated by the Model Act. Such statutory

provisions are found in the following states, at least: Ala., Ark., Calif., Fla., Ind., Iowa, Ky., Md., Mich., Mo., N. H., N. J., N. D., Ohio, Penna., S. C., Tenn., Texas, W. Va., Wisc.

There was substantial unanimity of opinion among the state representatives as to the desirability of enacting legislation of general application imposing on all agencies requirements as to hearing and notice similar to those found in Section 8 of the Model Act. The representatives of nineteen states went on record in favor of such a provision, while only three members were opposed (and their opposition was qualified).

Assertions are made from time to time that agency notices of hearing are insufficient properly to apprise the respondent of the actual issues, by reason of the fact that the notice merely refers to the particular statute which is involved and does not set forth with particularity the asserted claims on which the issues arise. The state representatives were therefore asked whether they would favor a statutory provision declaring it insufficient to state the issue in terms of the statutory language, and requiring that the notice must set forth specific allegations of fact. This proposal met a favorable response: nineteen state representatives expressed themselves in favor of such legislation, while eight were opposed. In this connection, it was suggested that the California statute (Gov't. Code, Sections 11503 and 11504, which declares in part that the notice "shall not consist merely of charges phrased in the language of such statutes and rules") provides a compromise which has been quite satisfactory in practice. Another suggestion was made that in lieu of requiring an agency to state the facts fully in the initial notice, it would be satisfactory if a requirement were enacted entitling respondents to obtain bills of particulars whenever they felt a need thereof.

On the question as to how much in advance of the hearing notice should be given, it appeared that most state representatives felt that normally a ten to twenty day notice was sufficient. However, six felt that twenty days was insufficient.

### *5. Evidence*

The state representatives exhibited the contrariety of opinion which is always notable when lawyers discuss matters pertaining to evidentiary requirements.

So far as appears on the basis of answers to the committee survey, no states (beyond the handful which have adopted legislation following the Model Act) have enacted statutes incorporating the principle of Section 9 of the Model Act, that agencies may give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. The state representatives were somewhat lukewarm on the question as to the desirability of such legislative enactment. Fourteen approved it, while six disapproved it, and twelve did not choose to express an opinion.

However, there appears some willingness on the part of the state courts to reach such result without the benefit of legislation. In many of the states covered in the survey, it appeared that there has been ex-

hibited some tendency to veer away from the legal residuum rule. Representatives of twelve states reported that it is unsettled whether their courts will continue to insist upon the presence of a residuum of legally competent evidence; and in a few states the courts have made it quite clear that legally competent evidence will not be required. On the other hand, reports from members of the committee indicated that in ten states (Ala., Calif., Kan., Mass., Mich., Mo., N. J., N. Y., Texas, and Wisc.) the courts, in some cases at least, still enforce the rule that an administrative finding of fact cannot be deemed to be supported by substantial evidence unless the finding is supported at least in part by legally competent evidence.

Twenty-four of the state representatives expressed an opinion on the question as to the desirability of a rule providing that an agency finding could not be said to be supported by substantial evidence unless supported by legally competent evidence. Ten (including representatives of seven states where it is now at least doubtful whether there is such a requirement) felt that such a requirement would be desirable. Fourteen felt that such a requirement would not be desirable. Among the ten who were in favor of such a requirement, there were four who were willing to relax the rule to the extent that evidence might be deemed substantial, even though inadmissible in a law suit, if the evidence were found by the reviewing court to be reliable and of probative value under the circumstances.

Only one of the state representatives supported a proposal that would require agencies to exclude all testimonial offers which would be inadmissible in a non-jury trial in the state courts.

### *6. Procedure for Adjudication*

Except for states having comprehensive codes of administrative procedure, there appears to have been enacted very little legislation adopting the principle set forth in Section 9 of the Model Act, that no factual information may be considered by an agency in the determination of a contested case which has not been received in evidence and made a part of the record. Answers to the committee questionnaire indicated that such legislation exists in Calif., Ind., Mo., Nev., N. D., Wisc., and Mich. Representatives of fourteen states felt that it would be desirable to have such legislation, while representatives of seven states saw no necessity therefor. Apparently the courts of at least nine states have insisted, independent of statutory requirement, that agencies consider only matters which have been received in evidence. Members of the committee stated that such is the judicial rule in Ariz., Calif., Mass., N. J., N. Y., Ohio, Okla., R. I., and W. Va. (In many states, of course, the question has not arisen.)

Likewise, it appears that there has been, as yet, but little legislative adoption of the principle set forth in Section 10 of the Model Act which requires that whenever, in a contested case, a majority of the officials who are to render the final decision have not heard or read the evidence, no decision adverse to respondent may be made until a proposed decision, including findings and conclusions, has been served on

the affected parties and an opportunity given them to argue thereon before a majority of the officials who are to render the decision and who shall personally consider such portions of the record as may be cited by the parties. That such legislation would be welcomed by the bar is indicated by the fact that representatives of twenty-one states expressed themselves as favoring such legislation, while only four were opposed.

There have apparently been comparatively few state court decisions applying the so-called rule of the *Morgan* case, that he who decides must hear.[5]

On the question as to whether it was believed that agency officials did actually study the transcript of testimony before making a decision, replies were received from twenty-three states. In eleven states, it was believed that agency officials did customarily actually study the transcript. In five states, it was believed that agency officials sometimes studied the transcript and sometimes did not, depending upon the agency and the nature of the particular case. In the remaining seven states, it was considered doubtful whether the agency officials did actually study the transcript of testimony, where the evidence was taken by a subordinate.

[5] In this connection, see: (*Meyer vs Board of Medical Examiners* 34 Cal. 2d 62;*Boott Mills vs. Board of Medical Examiners* 311 Mass. 223; *American Employers' Insurance Co. v. Commissioner*, 298 Mass. 161; *Horsman Dolls, Inc. vs. Unemployment Compensation Commission*, 134 N.J.L. 77; *Amerade Petroleum Corp. vs. Hester*, 188 Okla. 394, 109 Pacific 2d 829; *Pettiford vs. Board of Education*, 218 S.C. 322 62 S.E. 2d 780; *Webster vs. Texas and Pacific Motor Transport Co.* (Texas) 166 S.W. 2d 75; *State vs. Wrabetz*, 231 Wisc. 147 285 N.W. 504.)

General recognition of the desirability of the requirement that agency decisions and orders, adverse to a party in a contested case, should be accompanied by findings of fact and conclusions of law, is indicated by the fact that twelve states reported that such legislation exists as to at least some agencies (Ark., Calif., Ind., Mo., Mich., N. H., N. J., N. Y., N. D., Ohio, Texas, Wisc.). As the desirability of enactment of a generally applicable provision requiring the filing of findings and conclusions, the vote of state representatives expressing an opinion was twenty to two in favor of such a proposal.

### *7. Judicial Review*

The answers to the committee questionnaire indicated that in the following thirteen states, at least, there exists legislation setting up a method for judicial review which is uniformly applicable with respect to a large number of agencies if not all the agencies within the state: Calif., Ill., Ind., Mo., Mich., N. J., N. H., N. Y., N. D., Ohio, Penna., Tenn., Wisc.

On the question as to the desirability of having a method of judicial review which would be uniformly applicable to all agencies, representatives of nineteen states expressed themselves as being in favor of such an enactment, while four were opposed.

On the question of the scope of judicial review, twenty-one state representatives reported that they would favor statutory enactment prescribing the scope of judicial review provided in Section 12 of the Model Act. The other eleven state representatives expressed no opinion on this question. Rep-

resentatives of twenty states believed that the scope of review set forth in the Model Act is in general approximately the same as that exercised by the courts in their states. In eight cases, it was felt that the Model Act provided a broader review than the respective state courts presently exercised, and in only two states was it felt that the Model Act would provide for a more narrow review than the courts presently exercised.

FRANK E. COOPER
Chairman

## TRANSPORTATION

No new matters have arisen during the current year requiring action by the Committee on Transportation.

Last year the Committee opposed efforts to relieve the Interstate Commerce Commission from the effect of the Supreme Court decision in *Riss & Co.* v. *United States,* 341 U.S. 907 (1951). The relief was reportedly proposed as a rider to an Appropriations Act. We opposed such indirect limitations on the Administrative Procedure Act.

Since that time, the matter has proceeded in an orderly way by a proposed amendment H.R. 5045, 82nd Congress, to the Administrative Procedure Act. Hearings were had and the proposal received wide support including that of the Committee on the Administrative Procedure Act. The Transportation Committee concurs that the Act should be so amended.

The only other matter which the Transportation Committee has considered has been that of the status of trial examiners under the Administrative Procedure Act. This was suggested by the decision of Chief Judge Laws of the United States District Court for the District of Columbia, in a decision No. 5171-51 *Federal Trial Examiner's Conference* v. *Ramspeck et al.,* (1952). An editorial in the Traffic World, April 12, 1952, page 7, points out the dangers in the breadth of the decision. Our Committee feels that the independence of trial examiners should be preserved but that differences in ability and experience should be appropriately recognized by salary adjustments. There has to be a progressive training of young men as trial examiners. There are not sufficient funds available to maintain a complete roster of experienced and mature trial examiners, all drawing identical substantial salaries comparable to the federal judiciary.

However, it appears that the government will appeal the trial court's decision. (Traffic World, May 17, 1952, p. 23). The Committee on Transportation feels that it is premature to propose remedial legislation until the case has been concluded in the courts.

We recommend this matter be considered by next year's Committee on Transportation.

ALBERT E. STEPHAN
Chairman